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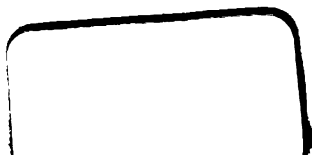
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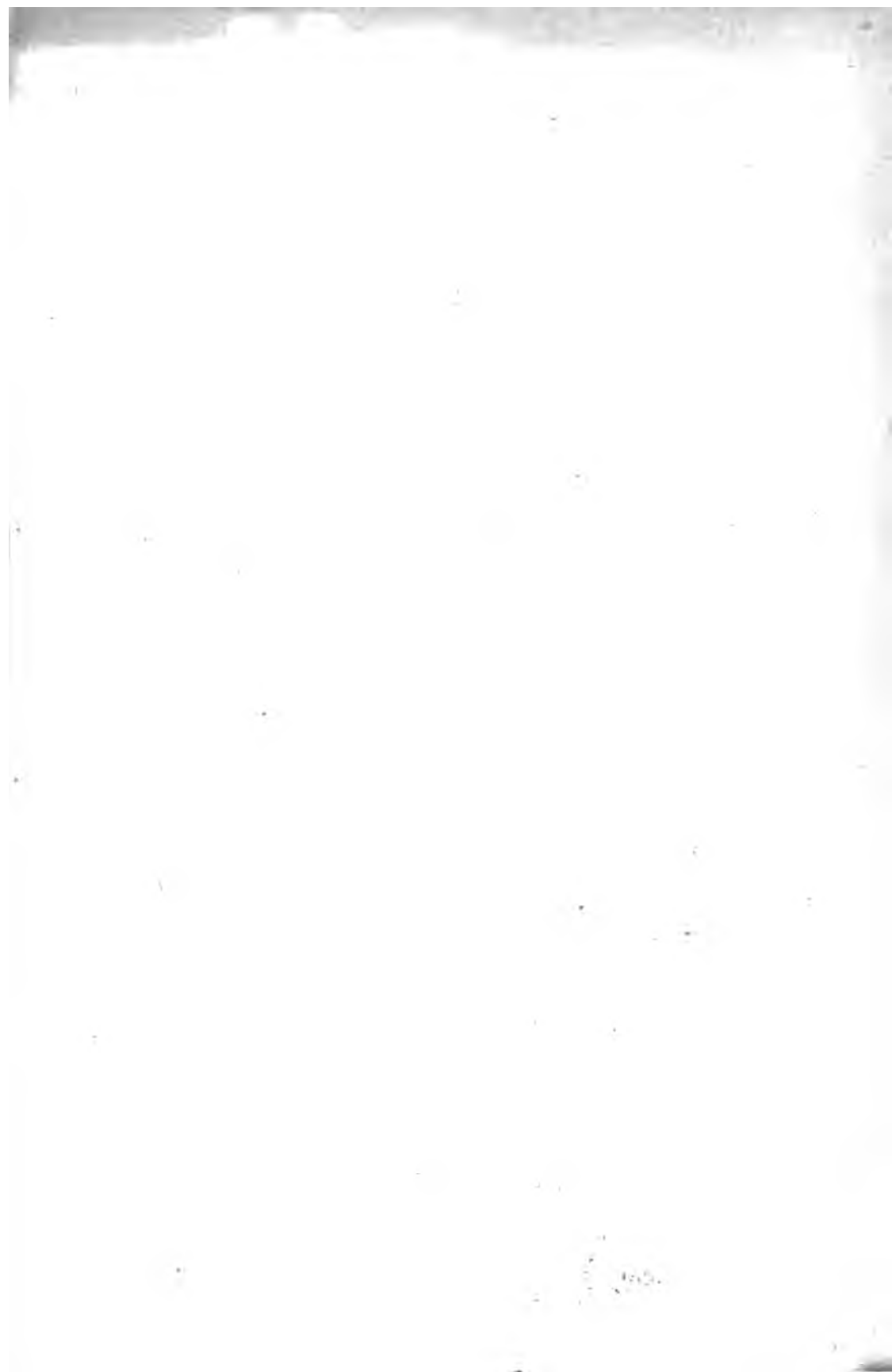
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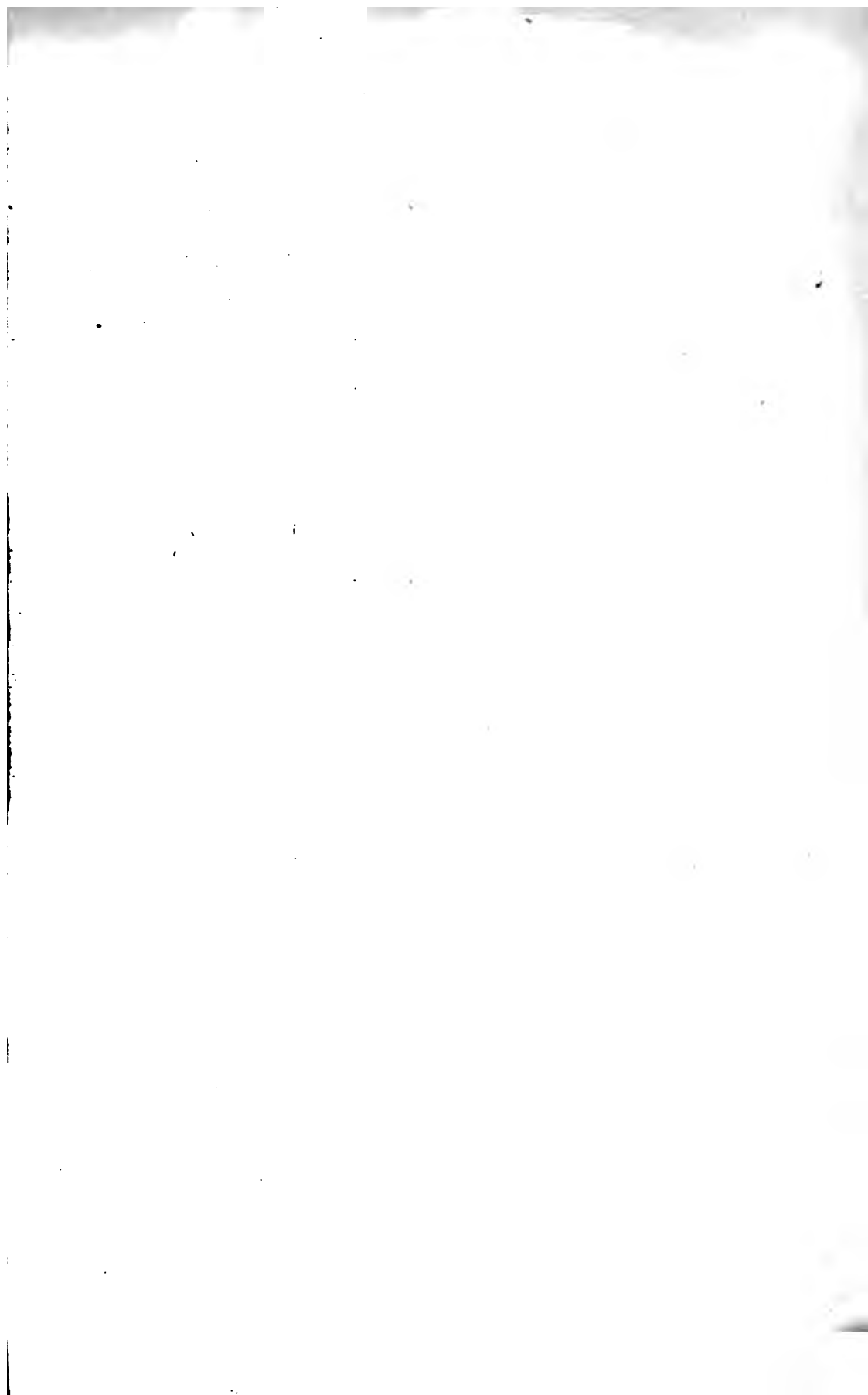
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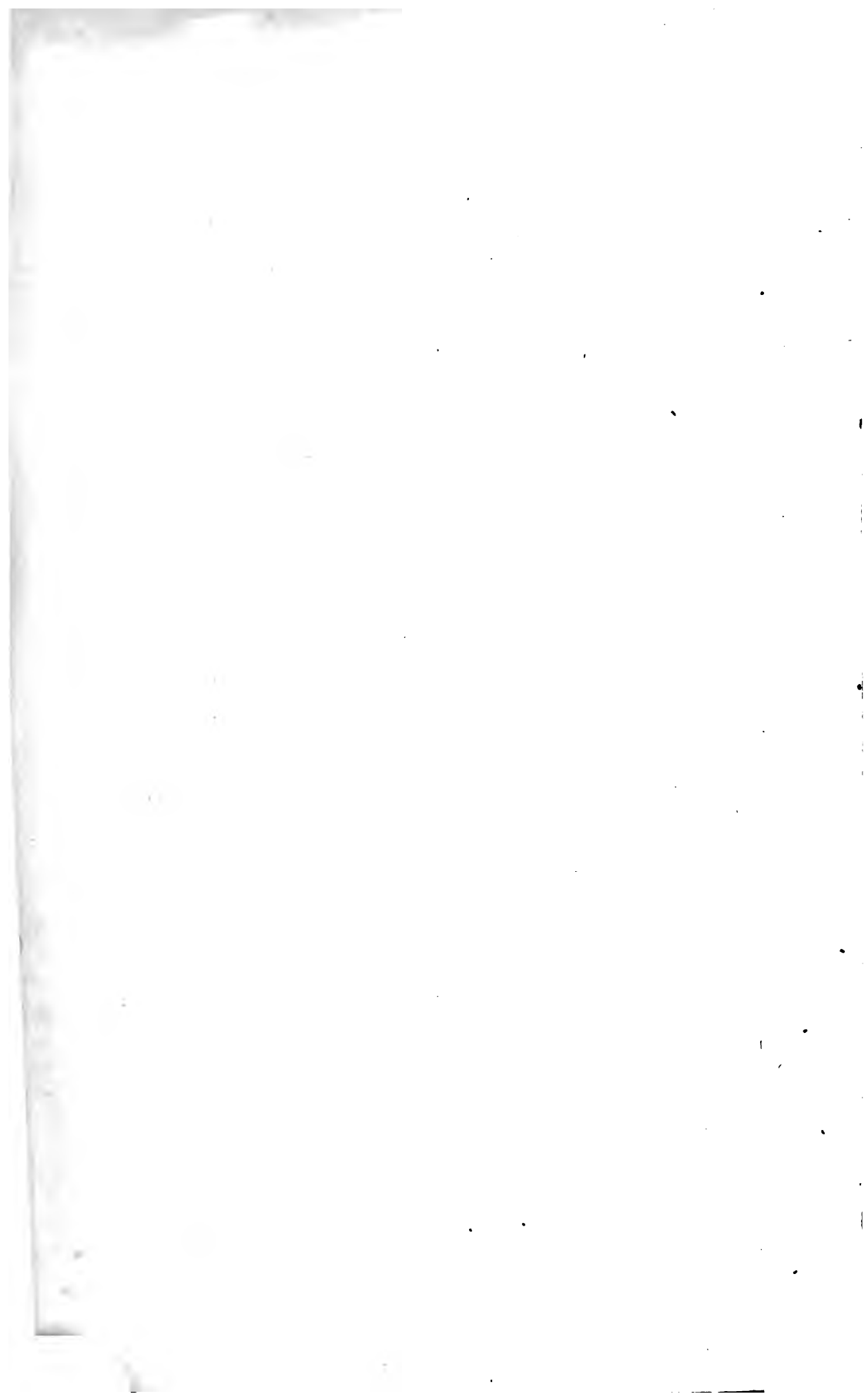
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BY CHARLES PETERSDORFF, ESQ.

OF THE INNER TEMPLE.

VOL. VIII.

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TABLE OF TITLES.

	Page.		Page.
Demurrer.	1	Distiller	396
Demurrer to Evidence	20	Distress	396
Demy Mark	23	Distribution, Statute of	447
Denial	23	Distringas	452
Denizen and Denization	23	Disturbance	459
Deodand	24	Dividend	459
Departure	25	Divorce	459
Departure in Pleading	25	Dock	462
Depasturing, Right of	25	Dock Warrant	462
Deposit	25	Docket Book	462
Deposit in lieu of Bail	26	Docket Roll	462
Depositions	32	Docketing Issues	462
Deprivation	32	Dogs	463
Deputy	32	Domicil	463
Descent	33	Doomsday Book	463
Deserter	77	Donatio Causa Mortis	464
Desire, Words of	77	Donative	465
Destroying, or Concealing Instruments	77	Doors	465
Detainer	77	Dormant Partner	465
Determination of Suit	80	Double Insurance	465
Detinet	80	Double Pleas	466
Detinue, Action of	80	Double Rent and Value	464
Devastavit	85	Dever Harbour	471
Deviation	85	Dower	472
De Ventre inspiciendo	85	Drainage	490
Devise	86	Drama	490
Die	377	Drawbacks	490
Diem clausit extremum	377	Driving	491
Dies non juridicus	377	Drunkenness	491
Digests	377	Duces tecum	491
Dignities	377	Duel	491
Dilatory	377	Dukes	496
Dilapidations	377	Dum fuit infra Ætatem	496
Diminution	377	Dum non compos Mentis	496
Diocese	377	Duplicity	496
Diploma	378	Duress	496
Direction of Process	378	Durham	497
Disabilities	378	Duties	497
Discharge	378	Dwelling-house	497
Disclaimer	378	Dyers	497
Discontinuance	379	Dying Declarations	497
Discount	393	Earnest	500
Disfranchisement	392	Easement	501
Dishonor	393	Easter Offerings	501
Disobedience to Order of Justices	393	East India Company	502
Disorderly	393	Ecclesiastical Persons and Courts	512
Disorderly Houses	394	Ejectment, Action of	539
Dispensation	394	Election	650
Dissection	394	Elegit	679
Disseisin	394	Ely	687
Disseisers, and Dissenting Meeting		Embezzlement	687
Houses and Ministers	396	Emblements	695
Dissolution	396	Embracery	696
Vol. VIII.	- A		

TABLE OF TITLES.

	Page.	Page.
Enemy	696 Entries	696
Enfranchisement	696 Entry	696
England, Bank of	696 Entry, Forcible	696
Engraving	696 Entry, Writ of	696
Engrossing	696 Equity	697
Enlistment	696 Equity of Redemption	698
Entirety	696 Easement	698

*** The Reference to the pages in the Table of Titles and Table of Cases refer to the English pages which are in brackets.

TABLE OF THE NAMES

OF THE

CASES ABRIDGED.

		Page		Page
Archerly v. Vernon	Devise	317	Anon. 2 Chit. Rep. 171. Ejectment	593
Adams v. Savage	Discontinuance	382	— 1 D & R. 435. n. —	593
Adderley v. Cookson	East India Company	507	— Adams' Ejectment, 203. —	593
African Company v. Mason	Discontinuance	385	— 1 Chit. Rep. 500. n. —	594
Aislable v. Rice	Devise	323	— 1 Chit. Rep. 500. n. —	595
Aleworth v. Roberts	Dower	489	— 2 Chit. Rep. 182. —	596
Alice v. Gale	Discontinuance	389	— 2 Chit. Rep. 178. —	597
Allen v. Heber	Descent	71	— 2 Chit. Rep. 176. —	598
Amory v. Brodrick	Demurrer	6	— 2 Chit. Rep. 181. —	599
Anderson v. Anderson	Dower	487	— 1 Chit. Rep. 574. }	600
Andrew v. Southouse	Devise	235	— 2 Chit. Rep. 185. }	601
Andrews v. Fulham	Devise	101. 305	— 1 Chit. Rep. 505. n. —	602
Anon. 2 Salk. 515.	Demurrer	9	— 2 Chit. Rep. 184. —	603
— 5 Mod. 18.	—	9	— 2 Chit. Rep. 182. —	603
— 2 Wils. 150	—	12	— 2 Chit. Rep. 187. —	604
— 2 Salk. 519.	—	14	— 2 Chit. Rep. 181. —	605
— 6 Mod. 133.	Devise	130	— 1 Chit. Rep. 228. —	606
— 3 Mod. 217.	—	162	— 2 Chit. Rep. 186. —	606
— Skin. 194.	—	173	— 2 Chit. Rep. 681. —	607
— Cart. 232.	—	228	— 1 Salk. 257. —	607
— 3 Salk. 127.	—	231	— 1 Chit. Rep. 536. n. —	607
— 2 Mod. 7.	—	294	— 1 Chit. Rep. 537. n. —	616
— Loft. 452.	—	301	— 12 Mod. 211. —	622
— 2 Vent. 363.	—	301	— 2 Sell. Prac. 144. —	631
— Lo R. 452.	—	302	— 2 Chit Rep. 190. —	637
— 6 Mod. 241.	—	305	— 6 Mod. 309. —	646
— Skin. 182.	—	330	— 1 Salk. 255. —	416
— 2 Mod. 7.	—	341	— v. Cooper	406
— Comb. 46.	—	343	Anscomb v. Shore	124
— 11 Mod. 89.	Discontinuance	385	Anstey v. Dowsing	192
— 3 Salk. 131.	—	388	Archer v. Bennett	11
— 12 Mod. 8.	—	392	Armagh, the Bishop of, Rex v.	207
— 1 Salk. 566.	Distribution	450	Arminer's Case	190
— 8 Taunt. 181.	Distringas	456	Arthur v. Bokenham	691
— 2 Saund. 44.	Dower	486	Aslett's Case	691
— 1 Salk. 68.	Duress	496	Aslett, Rex v.	8
— Skin. 412.	Ejectment	561	Aslett v. Vincent	389
— 2 Chit. Rep. 118.	—	575	Aslett v. Vincent	289
— 2 Chit. Rep. 172.	—	585	Atherton v. Pye	81
— 173.	—	587	Atkinson v. Baker	185
— 1 Chit. Rep. 573.	—	592	Atkyns v. Atkyns	
— 1 Chit. Rep. 573. n.	—		The Attorney Gene-	

ral v. the Mayor, &c. of the ancient town of Rye	Devise	374	Bibb v. Thomas	Devise	349
Attwood v. Burr	Discontinuance	387	Biner v. Juner	Ejectment	588
Aumble v. Jones	Devise	139	Bingham v. Noright	—	568
Bach v. Meats	Distress	437	Birch v. Lengen	Discontinuance	391
Backhouse v. Wells	Devise	274	Birch v. the Bishop of Litchfield	Ecclesiastical Persons	534
Bacon v. Peck	Eelegit	686	Bishop of Chichester v. Harwood	Ecclesiastical Persons	518
Baddeley v. Lepping- well	Devise	126 231 233	Bissett v. Caldwell	Distress	422
Badger v. Flويد	Ejectment	644	Blackborn v. Edgley	Devise	293
Badger v. Loyd	Devise	127 245 301 313 328	Blackborough v. Davis	Distribution	448 449
Bagnell v. Abnett	Devise	191	Blackferd v. Preston	East India Co.	504
Baker v. Leathes	Distress	403	Blackstone v. Stone	Devise	281
Baker v. Wall	Devise	159. 165 166. 223. 245	Blake v. Dodemead	Demurrer	8
Bakewell, Rex v.	Embezzlement	691	Blake v. Dodemead	Discontinuance	390
Baldwin v. Church	Demurrer	9	Bland v. Bland	Devise	207
Baldwin v. Karver	Devise	328	Blaxton v. Stone	—	282
Ballard v. Gerard	Desseisin	394	Bliss v. Harcourt	Discontinuance	389
Balls v. Attwood	Ecclesiastical Persons	532	Blissett v. Cranwell	Devise	229
Bamfield v. Popham	Devise	293	Bloxam v. Lutters	Distringas	458
Bare v. Amherst	—	294	Bodenham v. Pritchard	Devise	201
Barker v. Giles	—	330	Belts v. Purvis	East India Co.	504
Barker v. Suretees	—	323	Bond v. Seawell	Devise	118
Barkley v. Faber	Detainer	78	Bouchier v. Friend	Ejectment	620
Barnes v. Peterson	Ejectment	582	Bound v. Vaughan	Distringas	458
Barry v. Edgworth	Devise	215	Bouner v. Hall	Discontinuance	391
Basket v. Rayner	Detainer	79	Bowes v. Bowes	Devise	366
Bass v. Bradford	Ejectment	623	Rowman v. Milbanke	—	177. 191
Bate's Case	Dower	479	Bradford v. Foley	—	295
Bate v. Amherst and another	Devise	103 162 305	Bradney v. Hassalden	Ejectment	609
Bates v. Cort	Demurrer	12	Brady v. Cubitt	Devise	356
Bateman v. Roach	Devise	330	Braithwaite v. Cooksey	Distress	423
Bayham v. Matthews	Discontinuance	386	Brandscomb v. Bridges	—	442
Baynes v. Smith	Distress	422	Brandt v. Peacock	Discontinuance	387
Beable v. Dodd	Devise	190	Frazennose College, Oxford, v. the Bish- op of Salisbury	Ecclesiastical Persons	523
Beachcroft v. Brooms	—	294	Brice v. Smith	Devise	121. 248
Beard v. Westcott	—	309. 311	Bridgwater v. Bolton	—	173. 215. 363
Beaumont v. —	Detinue	81	Brittam v. Charnock	Descent	72
Beaurain v. Scott	Ecclesiastical Courts	539	Broderick v. Broderick	Devise	120
Beavan v. Delahay	Distress	428	Bromfield v. Crowder	—	299
Bebb v. Penoyre	Devise	171	Bromwick's Case	Duel	492
Beckett v. Harden	—	364	Brown v. Cutler	Devise	294
Bellayse v. Hester	Demurrer	13	Browne v. Shore	Distribution	450
Bennington v. Goodtitle	Ejectment	582	Browning v. Dam	Demurrer	9
Benson v. Scot	Dower	484	Browning v. Dam	Distress	430
Bern v. Bern	—	490	Bruce v. Bainbridge	Devise	220
Berrington v. Parkhurst	Ejectment	558	Bruce v. Bruce	Domicil	463
Berry v. Wheeler	Elegit	681	Brunker v. Cook	Devise	104. 105
Bertie v. Falkland	Devise	156	Buck, d. Walley, v. Nurton	—	192
Bettison v. Riekards	—	128. 228	Buckley v. Buckley	Ejectment	618
Bevan v. Williams	Ecclesiastical Persons	531	Bulwer v. Bulwer	Ecclesiastical Persons	534
Beveson v. Hussey	Devise	245	Bunker v. Coke	Devise	113. 190
			Bunn v. Markham	Donatio Causa Mortis	464
			Burchett v. Durdant	Devise	165

NAMES OF CASES.

vii

Burdett v. Coleman	Demurrer	15	Clarke v. Yeates	Deposit in lieu of Bail	30
Burdon v. Burdon	Dower	485	Clayton v. Lowe	Devise	330
Burford v. Lee	Devise	314	Clement v. Milner	Distress	404
Burne v. Richardson	Distress	49	Cleveland v. Wilson	Election	677
Burnell v. Davy	Devise	128	Cliffe v. Gibbons	Devise	215
Burt v. Moore	Distress	403	Clymer and Littler, ex parte	—	159. 642
Burtonshaw v. Gilbert	Devise	351 352 368	Cobb v. Stokes	Double Rent and Value	467. 468
Busby v. Greenslate	—	375	Cocksedge v. Fanshaw	Demurrer in Evidenc	20
Bush v. Allen	Devise	172	Cole v. Levingstone	Devise	288
Butler, Rex v.	Demurrer	8	— v. Rawlinson	—	144. 157. 224
Cadby v. Parsons	Deposit in lieu of Bail	29	Collingwood v. Pace	Descent	38
Cagalet v. Dubois	Distringas	457	— v. Pays	Devise	166
Caldicot v. Smith	Distribution	449	Comber v. Hill	—	288
Caldwell v. Ball	Equity	697	Coningsby's Lord) case	Ejectment	647
Callaway v. Bond	Detainer	78	Connor v. West	—	580. 538
Camden v. Anderson	East India Company	502	Cook v. Glasscock	Discontinuance	381
Camell v. Clavering	Ejectment	585	Cooke v. Gerrard	Devise	184. 189
Camfield v. Gilbert	Devise	172	Cooper v. Barker	Easement	501
Campbell v. Lewis	Demurrer	14	— v. Jones	Devise	287
Campbell v. Vaughan	Devise	129	Coot v. Berty	Dower	485
— v. St. John	Discontinuance	389	Copleston v. Piper	Ejectment	584
Canterbury, the Archbishop of, Rex v.	Ecclesiastical Persons,	15. 516	Copley v. Delancy	Demurrer	11
Carleton v. Griffin	Devise	122, 160	Cort v. Birbeck	Equity	697
Carpenter v. Chapman	—	215	Coulson v. Coulson	Devise	254
Carr v. the Earl of Errol	—	323	Courthorpe v. Heyman	—	172
Carsey v. Wood	—	143	Coux v. Lowther	Discontinuance	392
Carter v. Davies	Discontinuance	389	Crane v. James	Devise	248
— v. Horner	Devise	191, 215	Crighton, Rex v.	Embezzlement	695
Cathcart v. Hardy	Ecclesiastical Persons,	525. 531	Crocker v. Fothergill	Ejectment	618
Caulin v. Lawley	Distringas	454	Croft v. Pawlett	Devise	121
Chadwick v. Battye	Deposit in lieu of Bail	28	Cromther v. Ramsbottom	Distress	442
Challenger v. Shepherd	Devise	209	Crosier v. Tomkinson	—	424
Chapman v. Brown	—	138. 143. 294	Cross v. Salter	Ecclesiastical Courts	538
—, d. Scholes, v. Scholes	—	247	Crosse v. Wilson	Demurrer	8
Chaplin v. Leroux	Descent	72	Crow v. Mason	Discontinuance	390
Charlwood v. Morgan	Discontinuance	384	Crowder v. Goodson	—	390
Cheasley v. Barnes	Demurrer	9	Crump, d. Woolley, v. Norwood	Devise	263
Chertsey the Lord and Steward of the Manor of, Rex v.	Devise	372	Cuthbert v. Lempriere	—	129. 223
Chester, Bishop of, Rex v.	Ecclesiastical Persons	520	Cutting v. Derby	Double Rent and Value,	469, 470
Chichester v. Chichester	Devise	215	Dacre's Case	Ejectment	580
Christopher v. Christopher	—	353	Daintree v. Justice	Detainer	79
Churchill v. Evans	Distress	405	Daintry v. Daintry	Devise	128
Clark v. Calvert	—	422	Dalby v. Champernon	—	184
— v. Gaskarth	—	422	Dansey v. Griffiths	—	268
Clarke v. Smith	Descent	71. 72. 306	Darley v. Langworthy	—	859
— v. Tucket	Distress	441	Darison v. Beaumont	—	165, 166
Vol. VIII.		B	Davenport v. Kirkly	Ejectment	604
			— v. Tyrrell	—	567
			Davie v. Stephens	Devise	245. 264
			Davies v. Chippendale	Detainer	78

Davis, d. Tully, v. Hamlin	Devise	207	Doe, d. Belasyse, v. The Earl of Lucan	Devise	181
— v. Norton	—	295	—, d. Bendale, v. Summersett	—	292
— v. Powell	Distress	419	—, d. Beaumont, v. Armitage	Ejectment	607
Davy v. Smith	Devise	119	—, d. Biddle, v. Abrahams	—	549
Denn v. Gaskin	—	291, 300	—, d. Biddulph, v. Meakin	Devise	196
— v. Page	—	291	—, d. Blandford, v. Applin	—	229, 267, 278, 282, 283.
—, d. Balderston, v. Balderston,	—	162	—, d. Bland, v. Smith	Ejectment	550
—, d. Briddon, v. Page	—	268, 298	—, d. Borwell, v. Abey	Devise	334
—, d. Geering, v. Shenton	—	248, 258	—, d. Bradford v. Roe	Ejectment	579
—, d. Radclyffe, v. Bagshaw	—	150, 294	—, d. Bradshaw, v. Plowman	—	584
—, d. Gatterthwaite, v. Gatterthwaite	—	300	—, d. Briscoe, v. Clarke	Devise	293
—, d. Slater, v. Slater	—	249	—, d. Brown, v. Greening	—	204
—, d. Webb, v. Puckey	—	139, 255.	—, d. Browne, v. Hime	—	202, 261, 294
—, d. Wilkins, v. Kemeys	—	266, 282	—, d. Bruton v. Pegge	Ejectment	546
Denne, d. Briddon, v. Page	—	146, 154, 211	—, d. Bryant v. Whipple	—	589
Dighton v. Tomlinson	—	146, 151, 271	—, d. Budden, v. Harris	Devise	239
Dister v. Dister	—	207	—, d. Bunny v. Rout	—	170
Dobree v. The East India Company	East India Company	357, 359	—, d. Burden, v. Burville	—	289
Dobson v. Dobson	Dower	505	—, d. Burdett, v. Wright	—	292
Doe, d. Andrew, v. Lainchbury	Devise	488	—, d. Burkett, v. Chapman	—	176
—, d. Anglesy, v. Brown	Ejectment	174	—, d. Burville, v. Burville	—	207
—, d. Annandale, v. Brazer	Devise	563, 621, 633	—, d. Byne, v. Brewer	Ejectment	622
—, d. Ash, v. Calvert	—	213	—, d. Calkin, v. Tomlinson	Devise	162
—, d. Atkins, v. Roe	Ejectment	343	—, d. Candler, v. Smith	—	259, 282, 283
—, d. Aylesbury, v. Roe	—	600	—, d. Challiner, v. Davis	Ejectment	555
—, d. Baddam v. Roe	—	600	—, d. Chadwick, v. Law	—	647, 649
—, d. Bailey, v. Roe	—	594	—, d. Chattaway, v. Smith	Devise	168
—, d. Balch, v. Putt	Descent	598	—, d. Chancey, v. Ballers	Double Rent and Value	468
—, d. Baldwin, v. Rawding	Devise	74	—, d. Chichester, v. Oxenden	Devise	204
—, d. Barnfield v. Wetton	—	296	—, d. Earl of Cholmondeley, v. Maxey	—	306
—, d. Barnett, v. Keen	Descent	280, 305			
—, d. Bass, v. Roe	Ejectment	52			
—, d. Bates, v. Clayton	Devise	607			
—, d. Batten, v. Meerless	Ejectment	218			
—, d. Beach, v. Jersey	Devise	573			
—, d. Bean, v. Halley	—	128, 180, 200			
—, d. Beezley, v. Woodhouse	—	273, 282			
		236			

NAMES OF CASES.

ix

Doe, d. Earl of Cholmondeley, v. Weatherby	Devise	184	Doe, d. Duroure, v. Jones	Ejectment	556
—, d. Church, v. Barclay	Ejectment	648	—, d. Ellis, v. Ellis	Devise	245
—, d. Clarke, v. Clarke	Devise	101	—, d. Elsmore, v. Coleman	—	237
—, d. Clarke v. Grant	Ejectment	621	—, d. Elwood, v. Roe	Ejectment	597
—, d. Clements, v. Collins	Devise	194	—, d. Evans, v. Roe	—	602
—, d. Cock, v. Cooper	—	278. 282, 283	—, d. Everett, v. Cooke	Devise	297
—, d. Colclough, v. Mulliner	Ejectment	555	—, d. Feldon, v. Roe	Ejectment	648
—, d. Cole, v. Goldsmith	Devise	261	—, d. Fenwick, v. Reed	—	552
—, d. Cole, v. Weston	—	231, 232	—, d. Feverell v. Snee	—	597
—, d. Comberback, v. Perryn	—	136. 151. 248. 268	—, d. Field, v. Roe	—	598
—, d. Compere, v. Hucks	Ejectment	560	—, d. Filyard v. Cooper	—	614
—, d. Cook, v. Danvers	Devise	169. 206	—, d. Fisher, v. Prosser	—	556
—, d. Cooper, v. Collins	—	139. 275	—, d. Follet, v. Salter	—	625
—, d. Cordigan, v. Roe	Ejectment	579	—, d. Fonnereau, v. Fonnereau	Devise	286. 305
—, d. Cotterell, v. Roe	—	649	—, d. Forster, v. Wandlass	Ejectment	576
—, d. Cotron, v. Stenlake	Devise	228	—, d. Franklin, v. Trout	Devise	178
—, d. Crisp, v. Barber	Ejectment	548	—, d. Freestone, v. Parratt	—	328
—, d. Crutchfield, v. Pearce	Devise	208	—, d. Garner, v. Lawson	—	167
—, d. Cuff, v. Stradling	Ejectment	573	—, d. George, v. Jesson	Ejectment	557
—, d. Da Costa, v. Wharton	—	566	—, d. Gigg, v. Bradley	Devise	265
—, d. Dacre, v. Dacre	Devise	298	—, d. Giles, v. Barwick	Ejectment	617
—, d. Dacre v. Roper	—	221	—, Gill, v. Pearson	Devise	229. 221
—, d. Davis, v. Williams	Ejectment	615	—, Gillard, v. Gillard	—	205
—, d. Davy, v. Burnsall	Devise	275	—, d. Gilman v. Elvey	—	275
—, d. Dell, v. Pigott	—	205	—, d. Georges, v. Webb	—	288
—, d. Digby, v. Steel	Ejectment	627	—, d. Graham, v. Scott	Ecclesiastical Persons	521
—, d. Dilnot, v. Dilnot	Devise	359	—, d. Gregory, v. Whichelo	Descent	56
—, d. Drapers' Company, v. Wilson	Ejectment	630	—, d. Green v. Baker	Ejectment	570
—, d. Driver, v. Bowling	Devise	226	—, d. Gregory, v. Whichelo	Devise	287
—, d. Duckett, v. Watts	Ejectment	558	—, d. Griffin, v. Mason	Ejectment	625
Dean and Chapter of Durham v. the Archbishop of York	Ecclesiastical Persons	522	—, d. Grignor, v. Roe	—	628
—, d. Duroure, v. Jones	Descent	37	—, d. Grocers' Company, v. Roe	—	641
			—, d. Grundy, v. Clarke	—	570
			—, d. Haller v. Ironmonger	Devise	165. 239. 262
			—, d. Haman, v. Pettitt	Ejectment	630

Doe, d. Duchess of Hamilton, v. Ha- therly	Ejectment	647	Doe, d. Lee Compere, v. Hicks	Devise	230. 239
—, d. Hamilton, v. Robinson	—	622	—, d. Leicester v. Biggs	Ejectment	571
—, d. Hammek, v. Fillis	—	587	—, d. Lempriere, v. Martin	Devise	192. 195
—, d. Haniper, v. Roe	—	600	—, d. Lewis, v. Bing- ham	Ejectment	629
—, d. Hanson, v.	Devise	231. 248.	—, d. Lifford, v.	Devise	332
—, d. Harris, v. Greathead	—	154	—, d. Earl Lindsey, v. Colyear	—	246
—, d. Harrison, v. Masters	Ejectment	577	—, d. Liversage, v. Vaughan	—	270. 330
—, d. Harvey, v. Roe	—	599	—, d. Long, v.	—	261. 329
—, d. Hasley, v. Roe	—	596	—, d. Lovell, v. Roe	Ejectment	602
—, d. Hatch v. Bluck	Devise	248	—, d. Lowden, v.	—	549
—, d. Hayter, v. Joinville	—	370	—, d. Wat on	—	605
—, d. Hick, v. Dring	—	130. 157	—, d. Lowe, v. Roe	—	589
—, d. Hill, v. Roe	Ejectment	601	—, d. Ludham v.	—	620
—, d. Hindly, v. Rickarby	—	630	—, d. Luscombe, v. Yates	Devise	66
—, d. Hodsdon, v. Staple	—	546	—, d. Lushington, v. the Bishop of Llandaff	Descent	359
—, d. Holmes, v. Darby	—	641	—, d. Lushington, v. the Bishop of Llandaff	Devise	140
—, d. Holmes, v. Davis	—	641	—, d. Lyde, v. Lyde	—	559
—, d. Hull, v. Green- hill	Elegit	685	—, d. M'Dougall, v. Roe	Ejectment	589
—, d. Humphreys, v. Roberts	Devise	154	—, d. Marsack, v.	—	234
—, d. Hunt, v. Moore	—	299	—, d. Meacock, v. Allen	Devise	234
—, d. Hurrell, v. Hurrell	—	175. 240	—, d. Miller, v. Moor	—	553
—, d. Ibbetson, v. Land	Ejectment	563	Doe, d. Milner, v. Brightwen	Ejectment	594
—, d. Ingram, v. Roe	—	617	—, d. Morland, v.	—	1
—, d. Irwin, v. Roe	—	587	—, d. Bayliss	—	15
—, d. Jackson, v. Ramsbotham	Devise	233. 234	—, d. Morris, v. Under- down	Devise	518
—, d. James, v. Airs	—	186. 207	—, d. Munsack, v. Read	Ejectment	602
—, d. James, v. Hamilton	Ejectment	573	—, d. Murphy, v. Moore	—	303
—, d. James, v. Stanton	—	598	—, d. Mussel, v.	Devise	185
—, d. Johnson, v. Roe	—	637	—, d. Nethercote, v.	—	248
—, d. Jones, v. Jones	Discontinuance	380	—, d. Bartle	—	548
—, d. Jones, v. Roe	Ejectment	596	—, d. Neville, v. Rivers	—	319
—, d. Jones, v. Wilds	—	628	—, d. Newby, v. Jackson	Ejectment	
—, d. King, v. Frost	Devise	211. 281	—, d. Norfolk and another, v. Hawke	Devise	
—, d. Knight, v. Smythe	Ejectment	617			
—, d. Leach, v. Micklem	Devise	147. 301.			
—, d. Le Chevalier, v. Huthwaite,	—	162. 169			

NAMES OF CASES.

xi

Doe, d. Odiarne, v. Whitehead	Discontinuance	381	Doe, Shore, v. Porter	Ejectment	566. 590
—, d. Oldershaw, v. Breach	Ejectment	577	— Simons v. Masters	—	638
—, d. the Church-wardens and Overseers of the Parish of Orleton v. Harper	—	570	— Small, v. Allen	Devise	220
—, d. Orpe, v. Frost	Devise	228	— Smith, v. Bebbler	—	281
—, d. Palmer, v. Richards	—	209. 222	— Spencer, v. Read	Ejectment	620
—, d. Palmerston, v. Copeland	Ejectment	639	— Spring v. Ruckner	Devise	175. 179
—, d. Parkin, v. Parkin	Devise	180. 199	— Stephenson, v. Walkar	—	344
—, d. Pate, v. Davy	—	365	— Stevens, v. Snelling	—	148
—, d. Pate, v. Roe	Ejectment	640	— Stewart, v. Danton	Ejectment	584
—, d. Pearson, v. Roe	—	592	— Stewart, v. Sheffield	Devise	163. 189
—, d. Penwarden, v. Gilbert	Devise	173	— Stopford, v. Stopford	—	197
— Perkes, v. Perkes	Devise	350	— Scott, v. Roe	Ejectment	632
— Phillips, v. Phillips	—	196	— Strong, v. Goff	Devise	263
— Phillips, v. Reed	Ejectment	621	— Summons, v. Roe	Ejectment	605
— Phillips, v. Roe	—	578	— Surtas, v. Hall	—	559
— Phipps, v. Mulgrave	Devise	150. 269	— Sutton, v. Ridgway	—	649
— Pinchard, v. Roe	Ejectment	643. 648	— Sutton, v. Ridgway	Earnest	500
— Pitcher, v. Anderson	—	550	— Tarrant, v. Heller	Ejectment	562
— Planner, v. Scudamore	Devise	301	Den, d. Taylor, v. the Earl of Abingdon	Elegit	682
— Player, v. Nicholls	—	239	Doe, d. Earl of Thanet, v. Gartham	Ejectment	574
Davies, d. Povey, v. Doe	Ejectment	640	— Thomas, v. Roe	—	585
Doe, d. Powel, v. Hurst	—	600	— Thwaites, v. Carr	Devise	167
— Pratt, v. Timins	Descent	73	— Troughton, v. Roe	Ejectment	640
— Pritchett, v. Mitchell	Ejectment	550	— Tindale, v. Roe	—	603
— Prosser, v. Jenkins	Devise	239	— Tofield v. Tofield	Devise	177
— Reade, v. Reade	—	187	— Tomkyns v. Wilan	—	241
Dem, d. Richardson, v. Hood	—	217	— Tooley v. Gunsis	—	268
Doe, d. Roake, v. Nowell	—	299	— Troughton v. Roe	Ejectment	640
— Rogers, v. Mears	Ecclesiastical Persons	526	— Turner v. Kett	Devise	322. 366
— Rumford, v. Miller	Ejectment	607	— Tyrrell v. Iyford	—	200
— Ryall, v. Bell	Devise	192	— Usher, Jessep	—	370
— St. Margaret, Westminster v. Roe	Ejectment	592	— Vessey, v. Wilkin-son	—	130. 138. 294
— Sampson, v. Roe	—	621. 638	— Younghusband, v. Roe	Ejectment	612
Denn, d. Satterthwaite, v. Satterthwaite	Devise	237	— Walker, v. Roe	—	597
Doe, d. Schofield, v. Alexander	Ejectment	617	— Walker, v. Stevenson	—	648
— Scott, v. Roach	Devise	304	— Wall, v. Langlands	Devise	174
— Sedger, v. Roe	Ejectment	641	— Watson, v. Sheppard	—	296
— Shepard, v. Roe	—	587	Denne, d. Webb, v. Puckey	—	275
			Doe, d. Wells, v. Scott	—	189
			— Westlake, v. Westlake	—	374
			— Dean and Chapter of Westminster v. Freeman	—	323

Doe, Wheedon, v. Lea	Devise	300	The Court of Direct	} East India Company 507	
— White v. Barford	—	354	ors of the East India		
— White v. Cuff	Ejectment	628	Company, Rex v.		
— White, v. Simp-	Devise	238	East India Company v.	Devise	193
son			Sandys		
— Wickham, v. Tur-	—	147	Eastman v. Baker	—	151 268
ner			Eccleston v. Selby, <i>alias</i>	—	120
— Wight, v. Cun-	—	238	Speke		
dall			Edelsten v. Adams	Deposit in lieu of Bail	28, 29
— Willey, v. Holmes	—	233	Edwards v. Hammond	Devise	298. 318
— Williams, v. Hal-	—	160	Edwards v. Symons	Devise	333
lett			Egerton v. Still	Easter Offer-	
— Williams, v. Winch	Ejectment	649		ings	501
Winckley, v. Pye	—	628	Elmore v. Tucker	Distress	403
— Wolfe, v. Allcock	Devise	145	Etherton v. Popplewell	Distress	434
— Wood, v. Morris	Ejectment	624	Emerson v. Inchbird	Descent	71
— Wood, v. Wood	Devise	229	England, Rex v	Duel	495
— Woodcock, v.	—	239	England, d. Syburn, v.	Ejectment	549
Barthrop			Slade		
— Worthington, v.	Ejectment	604	Evans v. Astley	Devise	273. 282.
Bulcher			Evans v. Herbert	—	371
— Wright, v. Child	Devise	150	Evered v. Stone	—	342
— Wright, v. Jesson	—	259			295
— Wright, v. Mani-	—	120	Exeter, Bishop of, Rex v.	Ecclesiastical Persons	523
— — v. Badtitle	Ejectment	595			
— — v. Roe	—	592	Eyres v. Faulkland	Devise	208
— v. Allen	Devise	292	Fairclaim, d. Empson, v.	Ejectment	555
— v. Burrille	—	288	Shackleton,		
— v. Cooper	—	288	Fairclaim, d. Fowler, v.	Ejectment	613
— v. Greaves	Ejectment	593	Shamtitle,		
— v. Grundy	—	637	Fairfax v. Gray	Distress	412
— v. Laming	Devise	292	Fairfield v. Morgan	Devise	151
— v. Manger	Distress	434	Farrance v. Elkington	Double Rent and Value	467
— Mulgrave	Devise	291	Fawaer v. Je'ery	Devise	363
— v. Pilkington	Ejectment	607	Fedford v. Dendion	Ejectment	590
— v. Pott	Devise	360	Fell v. Fell	Devise	293
— v. Paye	Ejectment	577	Fimmius v. Rowlinson	Double Rent and Value	466
— v. Perkins	—	559	Fen, d. Loundes, v.	Devise	126. 162
— v. Rendell and another	—	609. 635	Loundes		
— v. Roe.	—	595 603 605	Fenn, d. Blandchard, v.	Ejectment	619
Don v. Brabant	Devise	302	Wood		
Douglass v. —	Ejectment	599	Fenn, d. Buckle, v. Roe	—	601
Douse v. Earl	Devise	191	Fenn, d. Pewress and	Ejectment	629
Down v. Down	Devise	199	Thompson, v. Granger		
Driver, d. Burton, v.	Discontinuance	380	Fenn, d. Tyrrell, v. Denn	—	599
Hussey			Fenny, d. Masters, v.	Elegit	682
Driver, d. Frank, v.	Devise	126	Durrant		
Frank			Fenny v. Eustace	Devise	153
Drummond, Rex v.	Dying Declara-	499	Fenwick's Case	Ejectment	614
	tions		Field v. Mitchell	Distress	441. 443
Dryer v. Mills	Deodand	25	Field, Rex v.	Ecclesiastical Persons	523
Dubber v. Trollop	Devise	282	Fisher v. Nicholls	Devise	170
Duncomb v. Duncomb	Dower	479	Fisher v. Wigg	—	330
Dunk v. Hunter	Disress	408	Fitchet v. Adams	Ejectment	560
Duppa v. Mayo	Devise	330	Fitzgerald v. Marshall	—	580. 582
Dutton v. Poole	Devise	165			
Eagleton v. the East In-	East India				
dia Company	Company	508			

NAMES OF CASES

xiii

Fletcher v. Dickenson	Ecclesiastical	Goodright, d. Baker, v.	Devise	235
Fletcher v. Pogson	Persons	Stocker		
Fletcher v. Smiton	Demurrer	Goodright, d. Balsh, v.	Ejectment	619
Flooe v. Blount	Devise	Rich		
Ford v. Grey	Equity	—, d. Brooking, v.	Devise	165. 166
Ford v. Osulston	Ejectment	White,		
Fortescue v. Abbott	Devise	—, d. Docking, v.	—	152. 248. 256.
Foster v. Burden	—	Dunham,		273. 294
Foster v. Romney	Ejectment	—, d. Drewry, v.		152. 225
Fowkes v. Joyce	Devise	Barron		
Fowle v. Welsh	Distress	—, d. Fowler, v.		110. 111
Fowler v. Blackwell	Demurrer	Forrester		
Frances v. Tomlinson	Devise	—, d. Glazier, v.		366
Francisco v. Gilmore	Dower	Glazier		
Francis v. Wyatt	East India	—, d. Hoole, v.		165
Frank v. Stovin	Company	Sales		
Freak v. Lee	Distress	—, d. Hoskins, v.		284
Freeman v. the Duke of	Devise	Hoskins		
Chandos	—	—, d. Lamb, v.		158
Friend v. Buehier	—	Pears		
Frogmorton, d. Bram-	—	—, d. Loyd, v.		272
ston, v. Holiday	—	Jones		
Frogmorton, d. Wright,	—	—, d. Parrack, v.		208. 243
v. Wright	—	Patch		
Fry's Case	—	—, d. Phipps, v.		233
Fuller v. Say	—	Allen		
Furneaux v. Fotherby	Easter Offer-	—, d. Revell, v.		300
Furnis v. Waterhouse	ings	Parker		
Gamage's Case	Distress	—, d. Smallwood, v.	Ejectment	588
Garland v. Thomas	435. 439	Strother,		
Garbut v. Hilton	Dower.	—, d. Stevenson, v.		576
Garnett v. Harwood	Devise	Noright		
George, d. Bradley, v.	—	— v. Cator		557. 560
Wisdom	—	— v. Cornish	Devise	156. 302
Gerard v. Gerard	—	— v. Downshire		185
Gibbons v. Summers	Ecclesiastical	— v. Hart	Ejectment	616
Gibbs v. Cope	Persons	— v. Jones		546. 646
Gibson and another v.	Ejectment	— v. Opie	Devise	118
Hunter	—	— v. Pollen		245. 258
Gilbert, Rex v.	Dower	— v. Welsh	Ejectment	584
Gilman v. Elton	Devise	— v. Wright	Devise	275
Gilpin v. Cookson	Demurrer	Goodtitle, d. —, v.	Ejectment	632
Gimbart v. Pelah	—	Badtitle		
Ginger v. White	Evidence	—, d. Brembridge,		586
Glasscock v. Morgan	Embezzlement	v. Walter		
Glasscock v. Morgan	695	—, d. Chester, v.		581
Glover v. Monck on	Distress	Alker		
Godbold v. Freestone	480. 477	—, d. Cross, v. Wod-	Devise	257
Godolphin v. Tudor	Distress	hull		
Goodman v. Goodright	Devise	—, d. Daniel, v.		186
Goodridge v. Goodridge	—	Miles		
Goodright, d. Alston, v.	—	—, d. Estwick v.	Ejectment	572
Wells	Descent	Way		
	47	—, d. Gallaway, v.		589
		Herbert		
		—, d. Gurnell, v.	Devise	305. 314
		Wood		
		—, d. Hart, v. Knot		189. 226

Goodtitle d. Hayward, v. Whitby,	Devise	294.	300	Griffin v. Scott	Distress	433
— d. Holford, v. —				Grillard v. Hogue	East India Com	
Otway			357	Grumble v. Bodilly	pany	510
— d. Mortimer, v. —	Ejectment	603		Grumble v. Jones	Ejectment	646
Notitle,				Gulliver, d. Clarke, v. Swift	Devise	207. 228
— d. Newman, v. —	Descent	49		Gulliver, d. Corrie, v. Ashby	Ejectment	597
Newman				Gulliver, d. Jeffreys, v. —	Devise	318
— d. Norris v. Morgan	Ejectment	569		Poynty		195
— d. Paddy, v. —	Devise	233		Gulliver v. Wickett		101. 305
Maddern			198	Gurnett v. Wood		302
— d. Paul, v. Paul				Gurney v. Hardenberg	Distringas	455
— d. Peake, v. —		268.	315	Habergham v. Vincent	Devise	157
Peggden				Haddock, Rex v. —	Demurrer	8
— d. Pinsert, v. —	Ejectment	586		Haiton v. Jeffreys		3
Iammiman,				Hale v. Norton	Discontinuance	386
— d. Radford, v. —	Devise	199		Hall, d. Doc, v. Surtees	Ejectment	554
Southern				Hamilton v. Stow	Dover Harbour	471
— d. Ranger, v. —	Ejectment	586		Hampstead, the Lord of the Manor, Case of	Deodand	24
Roe				Hanchet v. Thelwall	Demise	330
— d. Read, v. Bad —		603		Hands v. James	Devise	121
title				Hardacre v. Nash		178
— d. Richardson, v. —	Devise	231		Hardford v. Harris	Deposit in lieu of Bail	28
Edmonds			600	Harding v. Gardner	Devise	217
— d. Roberts v. —	Ejectment	257		Harman v. Dietrichen	Distringas	455
Badtitle				Harris v. Cooke	Distress	443
— d. Sweet, v. —	Devise	645		Harris v. Harris	Devise	305
Herring				Harris v. Jones	Discontinuance	386
— d. Taysum, v. —	Ejectment	340		Harrison v. Austin	Ecclesiastical Persons	518
Pope				Harrison v. Barnby	Distress	412
— d. Vincent v. —	Demise	604		Harton v. Harton	Devise	242
White				Harvey v. Harvey	Dower	489
— d. Wankler, v. —	Ejectment	293		Harwood v. Goodright	Devise	190. 347
Badtitle			190	Harwood, d. Goodright v. Rolfe		352. 366
— d. Winckles, v. —	Devise	584		Hastead v. Searle		180. 373
Bellington			618	Hastrop v. Hastings	Demurrer	13
— d. Woodhouse, —		586		Hatcher v. Fineaux	Ejectment	552. 554
v. Meredith		224		Hatfield v. Thorp	Devise	125
— d. Wright, v. Otway	Ejectment	256		Hawe v. Burton		104
way		584		Hawes v. Hawes		330
— v. Badtitle		306		Hawker v. Hawker		239
Goodwin v. Blackman		421		Hawkins v. Elewitt	Donatio Causa Mortis	464
Goodtitle v. Otway	Devise	28		Hay v. Coventry	Devise	156 282 291
— v. Wodhall		430		Hayes, d. Foorde, v. Foorde		253
— v. Walton	Ejectment	305		Haysman v. Moon		233
Gore v. Gore	Devise	172		Hayward v. Kinsey	Discontinuance	390
Gorton v. Falkner	Distress	456		Hazlewood, d. Price, v. Thatcher	Ejectment	593
Gould v. Berry	Deposit in lieu of Bail	28		Headge, Rex v. —	Embezzlement	688
Gould v. Bradstock	Distress	430		Heatherly, d. Worthington, v. Weston	Ejectment	589
Gower, d. Grosvenor, v. Piggot	Devise	305				
Grayson v. Atkinson		172				
Greaves v. Stokes	Distringas	456				
Gree v. Rolle	Ejectment	561.	634			
Green v. Floud	Devise	159				
Green v. Roe	Dower	487				
Gretton v. Haward	Devise	264				

NAMES OF CASES.

xv

Hedger v. Rowe	Descent	71	Jenkinson v. Thomas	Ecclesiastical	
Hoff's Case	Embezzlement	695	Jenner v. Yolland	Persons	525
Hegan v. Johnson	Distress	408	Jesson v. Wright	Distress	421
Henry v. Purcel	Devise	166	Johnson v. Allen	Devise	259
Herbert v. Torball	Devise	104. 364	Johnson, Rex v.	Ejectment	565
Hexham v. Coniers	Ejectment	584	Johnstone v. Sutton	Embezzlement	688. 693. 694. 695
Heylyn v. Heylyn	Devise	367	Jones v. Edwards	Demurrer	14
Higgs v. Dixon	Distress	430	Jones v. Fulham	Ejectment	617
Hill v. Chine	Deposit in lieu		Jones v. Newmen	Devise	162
Hilliard v. Jennings	Bail	28	Jones, d. Perry, v. Roe	—	159
Hilton v. King	Devise	123. 162	Jones v. Philpott	—	113
Hitchins v. Basset	—	115. 349	Jordan v. Harper	Discontinuance	382
Hobson's Case	—	161. 347	Jordan v. Pello	Ejectment	637
Hodgkinson v. Star	Embezzlement	693	Judin v. Samuel	Distringas	455
Hodgson v. Ambrose	Devise	159	Keat v. Barker	Demurrer	6
Hogan v. Jackson	—	375	Keech v. Hall	Discontinuance	393
Holdfast, d. Cowper, v. Marten	—	172	Keene v. Deardon	Ejectment	547
Holdfast v. Freeman	—	216	Keene v. Kirby	—	553
Holdfast, d. Hitchcock, v. Pardoe	Ejectment	592	Keene, d. Angel, v. Angel	Disseisin	394
Holleston v. Hibbert	Devise	199	Keene, d. Pinnock, v. Dickson	Ejectment	648
Holmes v. Meynel	Equity	697	Kellow v. Rowden	Devise	298
Holt, Rex v. —	Devise	126 282 287	Kenebel v. Scrafton	Descent	54
Hooper v. Dale	Disclaimer	378	Kent v. Kerry	Devise	355
Hope, d. Brown, v. Taylor	Ejectment	611	Kettle v. Bromsall	Dower	480. 486
Hopewell v. Ackland	Devise	177. 226	Keysworth v. Hill	Detinue	84
Horsefall v. Davey	Devise	438	Kildare v. Fisher	Demurrer	14
Horton v. Horton	Devise	239	Killingworth v. Brewster	Ejectment	582
Horton v. Peake	Distringas	453	Kingdon v. Nottle	—	579
Horton v. Whittaker	Devise	296	Kingsdale v. Mann	Demurrer	7
Howarth v. Samuel	Discontinuance	386	Knight's Case	Ejectment	640
Howson v. Walker	Detainer	78	Knight v. Symes	Discontinuance	392
Hughes v. Hughes	Distribution	450	Knollys, Rex v.	Ejectment	580
Hull v. Blake	Entry, Writ of	696	Lamb v. Archer	Demurrer	11
Humble v. Bland	Discontinuance	393	Lambe v. Blessington	Devise	314
Humphreys v. Bethily	Demurrer	15	Lancashire v. Lancashire	Distringas	457
Hunt v. Burn	Discontinuance	381, 383	Lancaster v. Fielder	Devise	353
Hunt v. Coles	Elegit	684	Lane v. Stanhope	Elegit	686
Hunt v. Puckmore	Demurrer	10	Lane v. Vane	Devise	141. 181
Huntingtower v. Gardiner	—	14	Lane v. Hawkins	—	162
Hurst v. the Earl of Winchelsea	—	70	Lane v. Wilkins	—	191. 215
Hutchins v. Chambers	Descent	441	Larkins v. Larkins	—	368
Hutchins v. Whitaker	Distress	435	Larkland, d. Dowling, Badland	—	351
Hyley v. Hyley	—	435	Lauder v. Cripps	Ejectment	593
Ilderton v. Ilderton	Devise	184. 215	Law v. Davis	Discontinuance	390
Iron v. Smallpiece	Dower	474. 487	Law v. Ibbetson	Devise	248
Ives v. Legge	Donatio Causa		Law v. Lincoln, Bishop of	Ecclesiastical	
Jackson v. Pesked	Mortis	664	Lawrence v. Dodwell	Persons	525
James v. Richardson	Devise	248	Lea v. Libb	Devise	106
Jenkins, d. Harris, v. Pritchard	Demurrer	14. 15	Leave v. Bernard	—	190 367
Jenkins v. Jenkins	Devise	165	Lee v. Stephens	—	121
	Ejectment	558		Demurrer	8
	Devise	236		Devise	235

Lee v. Withers	Devise	231	Marks v. Marks	Devise	311
Leery v. Goodson	Distress	445	Marsh v. Bulteel	Demurrer	13
Lees v. Wright	Distribution	448	Marshall v. Hill	Devise	237 ^a 238
Legard v. Haworth	Devise	164	Marshall v. Hopkins	— 144. 180.	199
Legate v. Sewell	—	258	Martin v. Townshend	Distringas	458
Leginham, Rex v.	Distress	443	Martin v. Davis	Ejectment	612
Leife v. Saltingstone	Devise	130. 226	Martyn v. Hind	Ecclesiastical	
Leigh v. Brace	—	248	Mason v. Watson	Persons	520
Leigh v. Shepherd	Distress	414	Maundy v. Maundy	Discontinuance	385
Leigh v. Kent	Ecclesiastical		Mawgridge's Case	Devise	143 172 193
Lemayne v. Stanley	Persons	530 532	Measure v. Gee	Duel	493
Lewis v. Harris	Devise	115	Medlycott v. Jortin	Devise	258
Lewis, d. Ormond, v. Waters	Distress	428	Melhuish v. Mauder	—	291
Le Writ v. Tolcher	Devise	272. 298	Melling, Rex v.	Discontinuance	386
Lind v. Murthwaite	Detinue	83	Mellish v. Mellish	Devise	255. 367
Lindon v. Hooper	Devise	279	Meredith v. Meredith	—	282
Lisle v. Gray.	Distress	446	Merest v. James	—	153
Littleton's Case.	Devise	257. 371	Messenger v. Armstrong	—	276
Littlehales v. Bosanquett	—	186	Middleton v. Swail	Double Rent	467
Lloyd v. Rosbee	Demurrer	10	Middleton v. Swaint	and Value	468
Loddington v. Kime	Double Rent		Millford v. Smith	Devise	291
Lothhouse v. Wharton	Value	468	Mills v. Graham	—	2-5
Long v. Blackhall	Devise	275	Mills of Manchester,	—	128
Long v. Buckeridge	Election	676	the Case of	Detinue	83
Long v. Dennis	Devise	309. 314	Minshull v. Hill	Equity	697
London, Bishop of,	Discontinuance	383	Molling v. Buckholtz	Devise	207
Rex v.	Devise	317. 326	Molyneux v. Scott	Discontinuance	385
London, City of, v. Wood	Ecclesiastical		Moone, d. Fagge, v. Heaseman	Devise	327
London, Mayor of, v. Cole	Persons	523	Moon v. Goodright	— 231. 244	
Love v. Wyndham	Discontinuance	390	Moor v. Parker	Ejectment	611
Loveacres, d. Mudge, v. Blight	Ejectment	586	Moor v. Price	Devise	253. 282
Lovelock, d. Norris v. Doncaster	Devise	113 306 314	Moore v. Taylor	— 215. 231	
Lowe v. Davies	—	224 330	Morgan v. Griffiths	Distringas	457
Lowe v. Jolliffe	Ejectment	612	Morgan v. Horseman	Devise	248
Lowe v. Manners	Devise	292	Morgan v. Jones	Erasure	698
Lowe v. Manners	—	344	Morgan, d. Surnam, v. Surnam	Devise	184
Lucas v. How	—	325	Morley v. —	—	294
Luddington v. Kime	Ejectment	564	Morley v. Strandorn	Discontinuance	388
Lug v. Goodwin	Devise	266. 294	Morros v. Burdett	Distringas	454
Luxford v. Cheeke	Demurrer	8	— v. Hunt	Election	673. 675
Lydcot v. Willows	Devise	323	— v. Jones	—	675
Lynne v. Moody	—	184. 189	Mosley v. Massey	Elegit	682
McGregor, Rex v.	Distress	441	Moss v. Gallemore	Devise	146. 154
Machell v. Temple	Embezzlement	693	Murthwaite v. Barnard	Distress	431
Machin v. Reynolds	Devise	120	Mu-grave v. Shelley	Devise	241
Macmurdo v. Burch	—	302	Nadbourne, Rex v.	Ejectment	560
McNabb v. Ingham	Distringas	454	Nanfan v. Legh	Dying Declara	
Maddon, d. Baker, v. White	—	452	Nerot v. Wallace	tions	497
Malloon v. Fitzgerald	Ejectment	567	Netherseal, Rex v.	Devise	247
Mares v. Mares	Devise	226	Newel v. Baker	Demurrer	14. 15
Market v. Johnson	—	305	Newland v. Majori	Devise	345
	Discontinuance	388	banks	Ejectment	606
			Newman v. Anderton	Devise	176
			Nicholl v. Nicholl	Distress	411
				Devise	294

NAMES OF CASES.

xvii

Nicholson v. Bouneys	Distringas	453. 156	Perrin v. Blake	Devise	250
Nicoll v. Verelst	Eas. Inc. a C m	594	— v. Lyon	—	324
Nore v. Windham	Ejectment	591	Petits v. Smith	Distribution	40
Norwich, Mayor of, v. Johnson	Visseisin	395	Pett v. Pett	—	449
Norton v. Tadd	Devise	223. 294	Phillips v. Phillips	Devise	329
Nottingham v. Jennings	Descent	69	Phillibrown v. Ryland	Demurrer	11
Nottingham v. Jennings	Devise	248	Phillips v. Deakin	Devise	294
Nunn v. Powell	Deposit in lieu of Bail	28	— v. Doelittle	Ejectment	575
Nurse v. Yearworth	Devise	101. 162	—, Rex v.	Duel	492
Oates v. Brydon	—	208	Phipard v. Mansfield	Devise	288
— v. Frith	Distress	409	Pibus v. Mitford	—	329
— v. Jackson	Devise	328	Pierce v. enriques	Discontinuance	388
— d. Markham, v. Cooke	—	207. 226. 239	— v. Win	Devise	322
— v. Shepard	Ejectment	608	Pierson v. Vickers	—	260
Old Alresford, Inhabitants of, Rex v.	—	581	Pinker v. the Inhabitants of East Hundred	Demurrer	7
Oldison v. Pickering	Distribution	418	Pippet v. Hearn	—	14
Oneby, Rex v.	Duel	493	Pistol d. Randal, v. Richardson	Devise	181
Ongby v. Chambers	Devise	195	Pit v. Ielham	—	282
— v. Peele	—	317. 371	Pitman v. Stevens	—	177
Osborne v. Walleeden	—	323	Pits v. Ielham	—	370
Osulton's, Lord, Case	—	246	Pitt v. Shew	Distress	433
Oxenden v. Pencerice	—	125	Pitts v. Evans	Ecclesiastical Persons	523
Oxford, the Bishop of, Rex v.	Ecclesiastical Persons	515	Plasket v. Beeby	Devise	342
Page v. Hayward	Devise	317	Platt v. Powlet	—	250
— v. Selfly	Ejectment	552	Plunkett v. Holmes	—	165. 305
Palfrey v. Baker	Distress	445	Plynter v. Bosen	Discontinuance	392
Pallen v. Pallmer	—	415	Poole v. Poole	Devise	136
Palmer v. Allcock	Distribution	440. 450	— v. Purdy	Discontinuance	385
Palwey v. Holly	Detinue	84	Pope v. Davis	Distress	406
Panton v. Jones	Distress	446	Porter v. Bradley	Devise	280
Parker v. Biscoe	Devise	366	Preston, d. Eagle, v. Funnell	—	207. 229. 248
— v. Clie	East India Company	506	Price v. Parker	Discontinuance	384
— v. Harris	Distress	408	— v. Warren	Devise	282
— v. Thacker	Devise	248	Pride v. Atwicke	—	372
— v. Turner	Deposit in lieu of Bail	29	Proctor v. the Bishop of Bath and Wells	—	312
Paris v. Miller	Devise	224	Puleston v. Warburton	Ejectment	606
Parley, d. Mayor of Canterbury, v. Wood	Ejectment	591	Pullen v. Purbecke	Elegit	681
Paslow v. Cripps	Distress	426	Pure, d. Withers, v. Sturdy	Ejectment	576
Parsons v. Peacock	Devise	294	Purefoy v. Rogers	Devise	222. 303
Partridge v. Ball	Ejectment	591	Pyne v. Dor	Equity	697
Paul v. Paul	Devise	180	Quin v. Reynolds	Detainer	78, 79
Peaceable v. Read	Ejectment	559	Radcliffe v. D'Oyley	Ecclesiastical Persons	536
Peacock v. Purvis	Distress	426	Ramshottom v. Buckhurst	Elegit	684
Peake v. Ougly	Devise	117	Randall v. Tuchin	Devise	215
Peate v. Triscott	Deposit in lieu of Bail	31	Ray v. Pung	Dower	479
Peck's Case	Embezzlement	689	Read v. Deatary	Easter Offerings	502
Pemble v. Sterne	Ejectment	83	Read v. Hatton	Devise	231
Pendock v. Mackinder	Devise	126	Reading v. Rawstorne	Ejectment	554
			Redding v. Royston	Descent	73
			Reed v. Hatton	Devise	235. 305

Rees v. Smith	Distress	439	Rex v. Taylor	Embezzlement	693
Reeve v. Long	Devise	302	— v. Walsh	Embezzlement	689
Reeves v. Gower	—	231	— v. Wheeler	Deodand	25
Reaves v. Winnington	—	191. 215	— v. Whittingham	Embezzlement	688
Regina v. Tuchin	Discontinuance	387	—	—	694
Reve v. Long	Devise	126. 162	— v. Woodcock	Dying Declara- tions	497
Rex v. Armagh, Bishop of	Demurrer	11	Ribbans v. Crickett	Election	676
Rex v. Aslett	Embezzlement	691	Rich v. Pilkington	Demurrer	13
— v. the Churchwar- dens of Axminster	Deodand	25	Richardson's Case	Dying Declara- tions	497
— v. Bakewell	Embezzlement	691	Ridhardson v. Chilcott	Devise	282
— v. Butler	Demurrer	8	Right, d. —, v. Wrong	Ejectment	598
— v. Canterbury, the Archbishop of	Ecclesiastical Persons	515. 516	— d. Compton, v. Compton	Devise	149. 153
— v. Chertsey, the Lord and Steward of the Manor of	Devise	372	—, d. Day, v. Day	—	210
— v. Chester, Bishop of	Ecclesiastical Persons	520	—, d. Hurd v. Saun- ders	—	212
— v. Crighton	Embezzlement	695	—, d. Lewis v. Beard	Ejectment	562. 578
— v. Drummond	Dying Declara- tions	499	—, d. Mitchell, v. Sidebotham	Devise	132. 222
— v. the East India Company	East India Company	507	— v. Freeman	Ejectment	595
— v. England	Duel	495	— v. Hammond	Devise	161
— v. Exeter, Bishop of	Ecclesiastical Persons	523	— v. Price	—	116. 121
— v. Field	Ec. Persons	523	— v. Russell	—	291
— v. Gilbert	Embezzlement	695	— v. Sidebotham	—	291
— v. Haddock	Demurrer	8	— d. Wrong	Ejectment	594
— v. Headge	Embezzlement	688	Risley v. Baltinglass	Devise	357. 360
— v. Holt	Disclaimer	378	Roberts v. Cook	Ejectment	647
— v. Johnson	Embezzlement	688. 693. 694. 695	Roberts v. Wetherall	Devise	239. 244
— v. Knollys	Demurrer	11	Robinson v. Grey	Devise	281. 283
— v. Leghnam	Distress	443	Robinson v. Robinson	Devise	281. 283
— v. London, Bishop of	Ecclesiastical Persons	523	Robinson v. Walter	Distress	424
— v. McGregor	Embezzlement	693	Robinson v. Watkins	Devise	291
— v. Melling	Devise	255. 267.	Roe v. Roe	Dower	488
— v. Nadbourne	Dying Declara- tions	497	— v. Williamson	Ejectment	591
— v. Netherseal	Devise	345	—, d. Aistrop, v. Aistrop	Descent	35
— v. Norwich, Dean Chapter of	Ecclesiastical Persons	519	—, d. Akins, v. Roe	Ejectment	596
— v. Old Alresford, Inhabitants of	Ejectment	531	—, d. Alport, v. Bacon	Devise	177. 218. 219
— v. Oneby	Duel	493	—, d. Bowes, v. Blackett	Devise	210. 291
— v. Oxford, the Bishop of	Ecclesiastical Persons	515	—, d. Bromley, v. Roe	Ejectment	598
— v. Phillips	Duel	492	—, d. Callow, v. Bolton	Devise	184. 291
— v. Reasen	Earnest	500	—, d. Chilcot, v. White	—	178
— v. Rice	Duel	419	—, d. Child v. Wright	—	217
— v. Robinson	Devise	322	—, d. Clement v. Briggs	—	245
— v. Show	Duel	495	—, d. Connolly, v. Ver- non	—	140. 200
— v. Southerton	Duress	496	—, d. Crow, v. Baldivere	Descent	75
— v. Stafford	Devise	256. 268	—, d. Dodson v. Grew	Devise	245. 274
— v. Taylor	Duel	494	—, d. Eberall, v. Iowe	—	266
			Fenwick, v. Doe	Ejectment	596
			—, d. Gray, v. Gray	Disconti- uance	384
			—, d. Haldane, v. Har-	Ejectment	548
			—, d. Hale, v. Wegg	Devise	105
			—, d. Hambrook, v. Doe	Ejectment	595
			—, d. Helling, v. Yeud	Devise	171
			—, d. Kirby v. Holmes	—	245. 291
			—, d. Lee, v. Ellis	Ejectment	608
			—, d. Mawson v. Jeffrey	Devise	311

NAMES OF CASES.

xix

Roe, d. Nightingale, v. Quarterley	Devise	137	Shaw v. Way	Devise	248
—, d. Pellatt v. Ferrers	Ejectment	555	Shaw v. Weigh	—	239. 267
—, d. Perry, v. Jones	Devise	109	Sheffield v. Mulgrave	—	183
—, d. Peter v. Daw	—	—	Shepherd v. Shepherd	—	355
—, d. Pye v. Bird	—	173. 184	Sheriff v. James	Distress	106
—, d. Raper v. Lonsdale	Ejectment	568. 589	Sherlock v. Templer	Demurrer	10
—, d. Sampson, v. Down	Devise	—	Sherratt v. Oakley	Devise	370
—, d. Shell, v. Pattison	—	222	Shields v. Cuthbertson	Demurrer	8
—, d. S. ers, v. Jeffrey	—	280	Shipwick v. Blanchard	Distress	444
—, d. Thong, v. Bedford	—	255	Shires v. Glasscock	Devise	119
—, d. Tooley, v. Gunnes	—	291	Short, d. Gastrell, v. Smith	—	351, 652
—, d. Truscott v. Elliott	Ejectment	559	Short v. King	Ejectment	647
—, d. Urry, v. Harvey	Devise	173. 216	Shortridge v. Lamplugh	Demurrer	9
—, d. Walker, v. Walker	—	179. 194	Shove v. Pinck	Devise	359
—, d. Wayman v. Doplis	Ejectment	568	Show, Rex v.	Duel	495
—, d. West v. Davies	—	575	Simpson v. Harcourt	Distress	420. 421
—, d. Wrangham, v. Harvey	—	590	Simpson v. Hartopp	—	419
—, d. Wren, v. Clayton	Devise	291	Skerry v. Preston	—	415
Rogers v. Birkmere	Distress	428. 435	Skinner v. Stacey	Ejectment	644
Rogers v. Pitcher	Ejectment	565	Slackford v. Austen	Deposit in lieu of Bail	26
Rogers v. Pitcher	Elegit	683	Smartle v. Scholler	Devise	226
Rogers, d. Dawson, v. Briggs,	Devise	291	Smartley v. Henden	Ejectment	610
Romily v. James	—	286	Smith v. Coffin	Devise	173
Roper v. Ratcliffe	—	172. 347	— v. Farnaby	—	305
Rose, d. Vere, v. Hill	—	329. 331	— v. Horlock	—	331
Routh v. Weddell	Demurrer	13	— v. Mapleback	Distress	410
Rowe v. Power	Dower	481	— v. Milford	Devise	157
Rowe v. Power	Ejectment	550	— v. Paynton	—	162
Rowse's Case	Devise	126. 138. 301. 302	— v. Russel	Distress	427
Rushel v. Haynes	Discontinuance	385	— v. Taylor	Ecl. Persons	531
Rutland v. Newham	Elegit	680	— v. Trigg	Devise	165
Ryall v. Rich	Double Rent and Value	471	— v. Tyndal	—	233. 235
Sacheverel v. Frogate	Distress	409	—, d. Davis, v. Sanders	—	185. 189
Salmon v. Denham	Devise	231	—, d. Ginger, v. Barnadiston	Ejectment	648
St. John v. Errington	—	193	—, d. Stourton, v. Hurst	Ejectment	596
St. John v. Winton. the Bishop of	—	180. 193	Snowe v. Cuttler	Devise	101. 305
St. Legar v. Adams	—	343	Somerville v. Lethbridge	—	369
Salisbury v. Proctor	Discontinuance	392	Soulaby v. Newis	Double Rent and Value	470
Sanford v. Irby	Devise	313	South v. Allen	Devise	172
Savage v. Dent	Ejectment	575	Southerton, Rex v. —	Duress	496
Scatterwood v. Edge	Devise	101. 162. 305. 369	Spence v. Stuart	Detainer	79
Scott v. Albany	—	171. 191	Spieres v. Parker	Demurrer	14
Scott v. Gould	Distringas	455	Spiller v. Adams	Dower	488
Scrape v. Rhodes	Devise	235. 330	Spragge v. Stone	Devise	353
Scrape v. Rhodes	Ejectment	606	Spratley v. Wilson	Double Insurance	465
Seale v. Barter	Devise	264. 287	Sprightly, d. Collins, v. Dumb	Ejectment	601
Seaward v. Willock	—	277	Stafford, Rex v. —	Devise	256. 268
Sealwyn v. Selwyn	—	109. 190	Staines, Sheriff of Middlesex, v. Johannot	Distringas	457
Serres v. Doda	Discontinuance	391	Stainham v. Bell	Devise	301. 302
Seven v. Mihill	Distress	427	Stamford v. Hobart	Elegit	681. 682
Seymour v. Greenville	Elegit	680			
Shaw v. Bull	Devise	130 175 215			

Stanley v. Wharton	Distress	437. 438	Townsend v. Wathen	Dogs	462
Stephens v. Brilridge	Discontin	381. 381	Tracy v. Smith	Distribution	449
Steward v. Bracebridge	Deposit in lieu of Bail	30	Trelaway v. the Bishop of Winchester	Ecclesiastical Persons	514
Stiles d. Rayment, v. Walford	Devis	237	Trent v. Hay	Devise	213
Still v. Coleridge	Fe. Person	552	Treuman v. Lambert	Flection	678
Stocker v. Perry	Ejectment	552	Tuchin, Regina v.	Discontinuance	387
Stokes v. Wooders n	Discontinuan	387	Tukerman v. Jefferie-	Devise	338
Stonehouse v. Ewen	Elegit	686	Turner v. Barnaby	Ejectment	634
Story v. Robinson	Distress	419	— v. Turner	Discontinuance	384
Stoughton v. Leigh	Dower	478. 481.	— v. Wall	Distringas	455
Strachey v. Turley	Election	482	Uthwatt v. Bryant	Devise	218
Strathmore v. Boughs	Devise	677	Vasper v. Edwards	Distress	402. 404
Strode v. Perryor	—	191	Vaughan v. Davis	—	439
Strong v. Peatt	—	162	Vertue v. Clive	East India Co.	506
Styles, d. Rayment v. Walford	—	185	Vicars v. Haydon	Ejectment	608
Sullivan v. Scagrove	Ejectment	215	Waddy v. Newton	—	581
Sumner v. Ferryman	Dress	583	Wain v. Bradbury	Deposit in lieu of Bail	26
Sutton v. Sutton	Devise	496	Waite's Case	Embezzlement	690
Swift, d. Neale, v. Roberts	—	351	Walker v. Rumbald	Distress	431
Tanner v. Wise	—	102	— v. Stevenson	Ejectment	648
Tapner, d. Peckham, v. Meritt	—	215	Wall v. Nixon	Ec. Persons	535
Taunton v. Costar	Ejectment	558	Wallace v. King	Distress	432. 444
Taylor v. Biddall	Distress	416	Walsh, Rex v.	Embezzlemen'	689
— v. Cole	Devise	101. 305	Walter v. Drew	Devise	282. 305
— v. —	Ejectment	565	Walum v. Smith	Discontinuance	393
—, Rex v. —	Elegit	683	Ward v. Hayden	Distress	431
—, Rex v. —	Duel	491	Warner v. Hutchinson	Devise	241
— v. —	Embezzlement	693	Watkin v. Sandys	Election	676
— v. Atkins	Dessetsu	395	Watmore v. Bruce	Distringas	455
Tenny, d. Agar, v. Agar	Devise	285	Watson v. Foxon	Devise	290
Thacker's Case	—	233	— v. Main	Distress	435
Thelluson v. Woodford	—	306	Watts v. Fullarton	Devise	360
Theobalds v. Duffoy	—	306	Wayde v. Carr	Diving	491
Thomas v. Howell	—	323, 328	Wealthy, d. Manley, v. Bosville	Devise	282
— v. Lloyd	Discontinuance	389	—, d. —, v. Bosville	—	225. 304
— v. Thomas	Devise	158. 374	Weake, d. Burge, v. Callaway	Ejectment	642
—, d. Jones, v. Evans	—	346	Weakley v. Rugg	Devise	163
Thomlinson v. Dighton	—	226	Weddall v. Jocar	Demurrer	9
Thomson v. Lawley	—	181	Weeks v. Peach	Discontinuance	388
— v. Martriter	Distress	425	Wellington v. Welling-	Devise	313
Thornton v. Adams	—	436	— ton	—	—
Throgmorton v. Bentley	Ejectment	640	West v. Moore	Devise	197
—, d. Miller v. Smith	—	646	West v. Morris	Devise	374
Thrustout v. Grey	—	646	Weston v. Mason	Demerrerr	14. 15
Thrustout v. Trouble-	—	647	Westwood v. Corine	Distress	431
— some	—	647	Whalley v. Reede	Devise	233
—, d. Williams, v. Holdfast	—	648	Wharfed v. Smart	Ejectment	643
Thunder, d. Weever, v. Belcher	—	568	Wharton v. Gresham	Devise	264
Tickner v. Tickner	Devise	361	Wheeler, Rex v.	Deodand	25
Tilley v. Collyer	—	165. 248	Wheldale v. Whelpdale	Dower	486. 489
Tomlinson v. Dighton	—	293	Whitbread v. May	Devise	204
Teovey v. Bassett	—	237	White v. Barber	—	162
			White v. Perry	—	288
			White v. Warner	—	246

NAMES OF CASES.

xxi

Whitelock v. Heddon	Devise	267	Woodward v. Robinson	Discontinuance	388
Whitners v. Harris	Ejectment	639	Wright v. Bond	—	213
Whitmore v. Williams	Discontinuance	385	— v. Flamank	Ecclesiastical	
Whittingham v. Anderson	Ejectment	583	— v. Hammond	Persons	527
Whittingham Rex v. —	Embezzlement	688	— v. Holford	Devise	294
Wild v. Nedham	Demurrer	9	— v. Horne	—	288
Wilkin v. Despard	Detinue	81	— v. Jones	—	188
Wilkinson v. Allot	Ecclesiastical		— v. Lamb	Discontinuance	386
— v. Colley	Persons	526	— v. Legge	Ecclesiastical	
— v. Jacques	Double Rent		— v. Littler	Persons	529
— v. South	and Value	469	— v. Littler	Devise	361
Williams v. Brown	Detainer	77	— v. Lloyd	Earnest	500
— v. Fry	Devise	315	— v. Holford	Ecclesiastical	
— v. Thomas	—	288	— v. Smith	Persons	533
—, d. Hughes, v. Thomas	—	323	— v. Whally	Devise	150
Willows v. Lydcot	—	184	— v. Wivel	Double Rent	
Wills v. Palmer	Disseisin	395	—, d. Bayly, v. Wrong	and Value	468
Wilson v. Duckett	Devise	184	—, d. Plowden, v. Cartwright	Ecclesiastical	
— v. Dyson	—	184	Wynkham v. Wynkham	Persons	533
— v. Robinson	Distress	421	Wynn v. Smythies	Devise	159. 161.
Winberboure v. Morgan	Devise	282	Wynne v. Budd	—	226
Winsor v. Pratt	—	191. 215. 224	— v. Kay	Ejectment	602
Withers v. Harris	Distress	432	— v. Moore	Devise	306
Wood v. Baron	Devise	116. 351	Young v. Murby	—	239
Wood v. Brandford	Ejectment	635. 539		Ecclesiastical	
Woodcock, Rex v. —	Devise	265		Persons	527
Wooden v. Moxen	Dower	489		—	533
Woodright v. Wright	Dying Declaration	497		—	530. 531.
Worsley v. Craven	Deposit in lieu of Bail	26		—	533
	Devise	168		—	530
	Devise	190		—	536

**** The References to the pages in the Table of Titles and Table of Cases
refer to the English pages which are in brackets.**

A
PRACTICAL ABRIDGMENT
OF THE
REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,
FROM THE RESTORATION, IN 1660, TO
MICHAELMAS TERM, 4 GEO. IV.

Demurrer.

See tits. Account, Action of, Adultery, Advowson, Apprentice, Arbitration and Award, Assault and Battery, Assumpsit, Bail, Bills of Exchange and Promissory Notes, Bond, Bribery, Charter-party, Common, Contract, Copyhold, Copyright, Covenant, Deceit, Demurrage, Distress, Dower, Ejectment, Escape, False Imprisonment, Fences, Ferry, Fish and Fishing, Fixtures, Franchises, Freight, Game, Gaming, Guarantee Hue and Cry, Insurance, Interest, Judgment, Landlord and Tenant, Lease, Legacy, Libel, Malicious Arrest, Malicious prosecution, Mortgage, Nuisance, Patent, Perjury, Post Horse Act, Post Office, Prize and Prize Money, Replevin, Sale, Bill of, Salvage, Seduction, Ship and Shipping, Simony, Slander, Tithes, Tolls, Trespass, Trover, Use and Occupation, Wager, Watercourse, Way.

- I. DEFINITION OF, p. 3
- II. WHEN A DEMURRER MAY BE MADE AVAILABLE, p. 3. [2]
- III. WHEN ADVISABLE, p. 4
- IV. TO PLEAS TO THE JURISDICTION See tit. Jurisdiction, Pleas to.
- V. ——— IN ABATEMENT. See tit. Abatement, Pleas in.
- VI. ——— DECLARATIONS, PLEAS IN BAR, REPLICATIONS, &c.
(A) WHEN GENERAL AND WHEN SPECIAL, p. 4.
(B) TO A PART OR A WHOLE, p. 6.
- VII. TO EXTENTS. See tit. Extent.
- VIII. IN SCIRE FACIAS. See tit. Scire Facias.
- IX. IN ERROR. See tit. Error.
- X. TO INDICTMENTS. See tit. Indictment.
- XI. AS TO THE TIME OF DEMURRING, p. 8.
- XII. FORMS OF, p. 8.
- XIII. AS TO WITHDRAWING A DEMURRER, p. 9.
- XIV. JOINDERS IN, p. 10.
- XV. AS TO SIGNING AND DELIVERING, p. 11.
- XVI. AS TO AMENDMENTS AFTER DEMURRER, p. 11.
- XVII. AS TO THE EFFECT OF A DEMURRER, p. 11.

DEMURRER.

XVIII. AS TO THE EFFECT OF PLEADING OVER, p. 14.

XIX. ARGUMENT ON.

(A) AT WHAT TIME, p. 15.

(B) IN THE KING'S BENCH.

1st. *Concilium*

(a) Motion for, p. 16. (b) Rule for, p. 17. (c) Signing, p. 17.

2d. Entering cause for, p. 17. 3d. Motion for judgment, p. 17.

(C) IN C. P., p. 18.

XX. JUDGMENTS ON.

(A) IN ABATEMENT, p. 18.

(B) IN BAR.

1st. Rule for, p. 19. 2d. Interlocutory.

(a) Signature of, p. 19. (b) Motion in arrest of, p. 19.

3d. Final, p. 19.

XXI. COSTS ON, p. 19.

XXII WRIT OF INQUIRY ON DEMURRER, p. 20.

I DEFINITION OF.*

A demurrer has been defined to be a declaration that the party demurring "will go no further," because his opponent has not shown sufficient matter against him;† *Leaves v. Bernard*, M. T. 1694; K. B. 5 Mod. 182. In other words, a demurrer admits the facts, and refers the law arising thereon to the judgment of the Court; Co. Litt. 71. b.

II. WHEN A DEMURRER MAY BE MADE AVAILABLE.

HAITON v. JEFFREYS. H. T. 1714. K. B. 10 Mod. 281.

Per Cur. There cannot be a demurrer upon a demurrer.‡

III. WHEN ADVISABLE.

Various considerations may influence a party in his election to demur, or pass over the mistake. These are pointed out in the note ||

* A demurrer is a plea; 1 *Ld. Raym.* 22.

† In general a party cannot demur unless the objection appear on the face of the preceding pleadings; *Moore*. 551. Thus, if the declaration omit to name the plaintiff, it is an objection to which that statement, on the face of it, is subject, and which should consequently be taken by way of demurrer; but if he is improperly named in the declaration, as William instead of John, the fact that his name is John, is one of a collateral nature, not disclosed by the declaration itself, and must be brought forward, therefore, by way of plea, viz. a plea in abatement. But in some cases where the plaintiff in the declaration partially states a deed which is defective, or contains matter qualifying the part stated, the defendant may craveoyer of the deed and set forth the whole, thereby making it part of the declaration, and then demur either in respect of the defect in the deed, or the improper manner in which the plaintiff has stated it, and this is the proper course when uponoyer it would appear that a bail bond is defective; see 2 *Saund.* 50; 1 *B. & C.* 358. So a deed untruly stated in a plea, being set out uponoyer by the plaintiff, becomes part of the plea, and if it thereby appear that the plea is false, the plaintiff need not show any matter of fact in his replication to maintain his action, but may demur; see 1 *Saund.* 316, 317: for it is a general rule that an indenture set out uponoyer becomes part of the preceding plea; see 1 *Saund.* 317; 1 *Chit. Pl.* 577.

‡ And in such case an abatement was refused, for it is a discontinuance; *Comb.* 323; *Salk.* 219.

§ A superfluous nor repugnant protestation is not a sufficient ground for demurrer; *Com. Dig. Pleader, N.* So, though a writ as recited at the commencement of the declaration appears to be erroneous, yet that is no ground for demurrer to the declaration; for the Court will not judge of any defect in the original writ without examination of the instrument itself; *Com. Dig. Pleader, C. 12*; 1 *Saund.* 318. n. 3. So surplusage is not a subject of demurrage, the maxim being that *utile per inutile non vitiatur*; Co. Litt. 203. b.

|| He should in the first place, be cautious to refrain from demurring, unless he be certain that his own previous pleading is substantially correct, *vide post*, p. 11. He should next consider whether the declaration or other pleading opposed to him is sufficient in substance and in form to put him to his answer. If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has ground for demurrer; but whether he should demur, or not, is a question of expediency; to be determined on the following views. If the pleading be insufficient in form, he is to consider whether it is worth while to take

There can not be a demurrer to a demurrer. §

[4]

VI. TO DECLARATIONS, PLEAS IN BAR, REPLICATIONS, &c.

(A. WHEN GENERAL AND WHEN SPECIAL.

Demurrers are either general or special; general, when no particular cause is alleged—special, when the particular imperfection is pointed out, and insisted upon as the ground of demurrer. The former will suffice, when the pleading is defective in substance; and the latter is requisite, when the objection is only to the form of pleading;† Bac. Ab. tit. Pleas, N. 5; Co. Litt. 72. a; 1 Chit. Pl. 4th edit. 574; Tidd's Prac. 8th edit. 750.

the objection, recollecting the indulgence which the law allows in the way of amendment; but also bearing in mind, that the objection, if not taken, will be aided by pleading over; or, after pleading over, by the verdict, he must take care to demur specially, lest, upon general demurrer, he should be held excluded from the objection. On the other hand, supposing an insufficiency in substance, he is to consider whether that insufficiency be in the case itself, or in the manner of statement; for, on the latter supposition, it might be removed by an amendment; and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove, or not, a further question will arise, whether it be not expedient to pass by the objection for the present, and plead over. For a party, by this means, often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of afterwards urging the objection in law, by motion in arrest of judgment: or writ of error. This double aim, however, is not always advisable; for though none but formal objections are cured by the statutes of jeofails and amendments, there are some defects of substance as well as form, which are aided by pleading over, or by a verdict, and, therefore, unless the fault be clearly of a kind not to be so aided, a demurrer is the only mode of objection that can be relied upon. The additional delay and expense of a trial is also, sometimes, a material reason for proceeding, in the regular way, by demurrer, and not waiting to move in arrest of judgment, or to bring a writ of error. And a concurrent motive for adopting that course is, that costs are not allowed when the judgment is arrested; 1 Sel. Pract. 497; *Amerson v. Reynolds*, Cowp. 407; nor where it is reversed upon writ of error; 2 Tidd. 1243. 8th edit.; each party in these cases, paying his own; but on demurrer, the party succeeding obtains his costs; *Stephen's Pleading*, 2d edit. p. 182.

† If a declaration do not state a good cause of action, the defendant may demur generally, for it is a defect in substance; Hob. 301. As for instance, if a man bring an action for excluding him from the vestry-room, without showing that the parish had any right to meet there, the defendant may demur generally, because no cause of action appears; Str. 624. So, if a contract declared on, appear from the declaration to be illegal, and consequently void, the defendant may demur generally; because no cause of action appears; Wils. 339. And if the action be upon a bond, the illegal consideration for which appears in the condition only, if the plaintiff declare on it as a common money bond, the defendant may set out the condition on oyer, and demur generally; and the same in all cases, where the condition of the bond, if set out in the declaration, would show that the plaintiff had no cause of action. But if the action be on a recognizance, and the declaration do not state the condition, the defendant cannot demur; for *non-constat* but the recognizance was unconditional; but he should avail himself of the defect, by plea of *null tiel* record; Barnes, 339. In like manner, if the matter of a plea in bar be no legal answer to that part of the declaration to which it is pleaded, or if the matter of a plea in abatement be not sufficient in law to abate the action, the plaintiff may demur generally. And the same as to replications and other subsequent pleadings. But it has been decided that a defendant cannot demur in abatement; for if he does, the Court will give final judgment against him, and not merely judgment of *respondeat ouster*; 1 Salk. 220; 6 Mod. 195. 198; Bac. Abr. Abatement, P. And where the defendant demurred to the replication, and concluded his demurrer in abatement, it was holden to be a discontinuance of the whole action; 1 Salk. 4; *Archibald's Pl.* 312.

It is unnecessary to state more than these general rules. The particular instances are stated under the heads in this abridgment, applicable to the subject matter.

† At common law, there were special demurrers, but they were never necessary except in cases of duplicity, and, therefore, were seldom used; for, as the law was then taken to be upon a special demurrer, the party could take advantage of no other defect in the pleadings, but of that which was specially assigned for cause of his demurrer; but upon a general demurrer, he might take advantage of all manner of defects, that of duplicity only excepted. And there was no inconvenience in this practice; for the pleadings being at bar *visa voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer, as upon a special one; 3 Salk. 122. Afterwards, when the practice of pleading at bar was altered, this public inconvenience followed from the use of general demurrers; that the parties went on to argument, without knowing what they were to argue: and this was the occasion of making the statute 27 Eliz. c. 5; by which it is enacted, that, "after demurrer joined and entered in any action or suit, in any court of record, the judges shall proceed and give judgment according as the very right of the cause and

A demurrer to a declaration, &c. is general, when to matter of [5] form; special when to matter of substance.

[6]

(B) TO A PART OR A WHOLE.*

1. JUDIN V. SAMUEL. E. T. 1804. C. P. 1 N. R. 43.

Where
there are
several
counts;

The first count of a declaration being in trover for bills of exchange; and the second and third counts, stating the delivery of the bills to the defendant, in order that he might get them discounted for a second commission; and his having got them discounted, and his converting and disposing of the money to his own use; the defendant demurred generally, on the ground of a misjoinder of tort and contract, the subject of the two last counts being matter of contract. But the Court held, that on a general demurrer, as all the counts were in the form of tort, judgment must be for the plaintiff, if any one count was good.

Or in cove-
nant, several
breaches;
some of
which are
sufficient,
and others
not, the de-
fendant
should only
demur to
the latter.

2, AMORY V. BRODRICK. E. T. 1822. K. B. 5 B. & A. 712; S. C., 1 D. & J. R. 361.

A. covenanted that he would from time to time, at the request of B. avow and confirm all actions that B. should bring in respect of a bond of which A. was the obligor, without releasing the same. Declaration stated that B. commenced an action in the name of A., against the obligee of the bond, and that A. did not, although often requested so to do, avow and justify the said action;

matter in law shall appear to them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer." And since this statute, it has been holden that a demurrer for an immaterial traverse, must be special; 1 Saund. 14. n. 2; 1 Stra. 694. So a demurrer for a negative pregnant; Lit. Reg. 437; or because a special plea amounts to a general issue, 10 Co. 94. n.; Doct. Pl. 116; Hob. 127 or for uncertainty; 1 Str. 681; 2 Ld. Raym. 1416; for repugnancy; 1 Str. 611; or the like, must be special. So, in an action of covenant, where the declaration assigned breaches of several covenants, some affirmative, some negative and the defendant pleaded performance generally, the Court held it to be matter of form merely, and that the demurrer should have been special; Cro. Eliz. 691. And, in fine, if a sufficient cause of action appear in the count, or a sufficient answer to the preceding pleading appear in the count, or a sufficient answer to the preceding pleading appear in the plea, &c., every other defect shall be deemed a defect in form, within the meaning of this statute, and can be the subject of a special demurrer only; Hob. 233; see Sir T. Jones, 197. 218. This statute, by making known the causes of demurrer, was so far restorative of the common law 3 Salk. 122; and as a general demurrer before did confess all matters formally pleaded, so, by this statute, whenever the right sufficiently appeared to the Court, it confessed all matters, though pleaded informally; Hob. 233. But there were still many defects and imperfections, which were not aided as form upon a general demurrer; to remedy which, it was enacted, by the statute 4. Ann. c. 16. that "no advantage or exception shall be taken of or for an immaterial traverse; the default of entering pledges upon any bill or declaration; the default of alleging a *profert in curia* of any bond, bill, indenture, or other deed, mentioned in the declaration, or other pleading, or of letters testamentary, or letters of administration; the omission of *vi et armis* or *contra pacem*; the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*; or not alleging *prout patet per recordum*; 11 East, 516. 565. But the Court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shown for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen Eliz., so as sufficient matter appear in the pleadings, upon which the Court may give judgment, according to the very right of the cause." Since the making of these statutes, the party, on a general demurrer, can only take advantage of defects in substance; and, therefore, if the defects be not clearly of that nature, it is safest to demur specially; in which case, he may not only take advantage of such defects, but also of any others that are specially set down; 1 Saund. 237. b. 3. Com. 305; 10 Mod. 348; 8 Mod. 56; Holt, 567; and see Chitty on Pleading, vol. 1. p. 638, &c. Yet, where a general demurrer is plainly sufficient, it is more usually adopted in practice; because, the effect of the special form being to apprise the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his pleading in argument, or of leading him to apply the earlier, to amend. The plaintiff, however, need never demur specially to a plea in abatement; per Bayley, J. 2 M. & S. 485.

* If a defendant demur only, and do not plead to a declaration, his demurrer must covert the whole declaration, otherwise it will be a discontinuance of the whole. So, if he demur to part only, he must plead to the residue, otherwise it will be a discontinuance to the whole; see Yelv. 5. 65; 2 Rol. 390; 1 Brownl. 192.

but, on the contrary thereof, executed a release to the obligee of all actions, bonds, &c.; by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expenses. Special demurrer.

Per Cur. The case of *Duffield v. Scott*, (5 T. R. 574.) is an authority to show that the last ground of demurrer cannot be supported. That was an action of debt on bond, conditioned for the performance of covenants. Upon oyer of the bond and of the deed, there appeared to be a covenant by the testator, to indemnify the plaintiff against all debts which his wife should, during separation, contract, and against the payment of alimony, and all costs which the plaintiff should be put to by his wife's contracts, debts, &c. The breach assigned in the replication was, that A. B. had brought an action against the plaintiff for a debt which his wife had contracted during separation, and had recovered judgment for the debt and costs, and that the plaintiff was obliged to pay the same, and to incur expences in the defence of the suit; yet that the defendant did not indemnify the plaintiff for the costs so paid by him, or for his expences. Upon demurrer, it was argued, that the replication could not be supported, because the plaintiff had assigned a breach for the non-payment of a gross sum, part of which the defendant was not bound to pay; because, in order to entitle the plaintiff to recover the costs and expences, he should have shown that he had given notice of it to the defendant. But it was held that the demurrer could not be supported; for the defendant was, at all events, answerable for the debt; and it was no objection to the action, that the plaintiff sought to recover more than they were actually entitled to. So, too, in covenant, if some of the breaches are good, and the others not, it is no ground of demurrer to the whole declaration, but the plaintiff shall have judgment for the breaches well assigned.

And this rule equally applies to one count, part of which is sufficient, and the residue not, when the matters are divisible in their nature.

2. *PINKEY V. THE INHABITANTS OF EAST HUNDRED*. T. T. 1670. K. B. 2 Saund. 379.

This was an action on the statute of hue and cry. The plaintiff declared for taking his money, and also certain goods, without showing that the goods were his property. The defendant demurred to the whole declaration on this ground. *Sed Per Cur.* The count as to the money is good; judgment must be therefore given for the plaintiff. See 1 Mod. 271; 11 East, 565; Com. Dig. tit. Pleader, C. 82. L. 3 5; 1 Wils. 284.

3. *KINGDON V. NOTTLE*. E. T. 1813. K. B. 1 M. & S. 355.

In this case, the Court held that a demurrer for cause of misjoinder of breaches of covenant must be to the whole declaration, and not to the breach alone, which is misjoined.

But where there is a misjoinder, the demurrer must be to the whole.*

XI. AS TO THE TIME OF DEMURRAGE.†

1. *REX V. HADDOCK*. H. T. 1737. K. B. Andr. 150.

Per Cur. As to the time; the party may demur at any time before judgment, though a plea to abatement cannot be after a general imparlance.

2. *ASLETT V. VINCINA*. E. T. 1726. K. B. 2 Ca. Pr. 1482.

The Court held, in this case, that a demurrer after issue joined amounted to a discontinuance.

8 | A demurrer may be after an imparlance; But a demurrer after issue joined is a discontinuance.

XII. FORMS OF,

1. *LEAVE V. BERNARD*. M. T. 1694. K. B. 5 Mod. 131; S. C. 12 id. 133. S. P. *SHIELDS V. CUTHBERTSON*. 2 Barnard, 133.

* And if a plea in advowry or replication, each of which is actionable, be bad in part, it is bad for the whole; 1 Saund. 28, 2 id. 124; 1 Salk. 312; 1 T. R. 40; 3 id. 374; and in that case the demurrer should be to the whole plea or replication; 1 Saund. 286; or it will be a discontinuance; Com. Dig., Pleader, Q. 3; except in the case of a plea of set off, two parts of which are considered as similar to two counts in a declaration; and if one part be good, a general demurrer to the whole will be bad; 2 Bl. Rep. 910.

† After an order is obtained for time to plead, the party under such terms may avail himself of a real and fair demurrer, but not of one without good cause; *vide post*. tit. Pleading.

‡ The usual form of a general demurrer to a declaration, after stating the title of the court and term, and the names of the parties, in the margin, and the defence as in the com-

No precise words are necessary in a demurrer;†

In this case, the Court held, that a plea which, though informal, was in substance a demurrer, was good.

And if it is ever so informal; yet if it is meant to be and is in substance a demurrer it is good.

[9]
Though, therefore, the demurrer was to several pleas, yet *placitum prædictum* was holden good;

But where the demurrer should be special, care must be taken to disclose the exact cause of demurrer.*

In K. B., the defendant cannot commonly waive a general demurrer;

But a special one may be waived after the book is made up, unless the defendant has been previously

2. REX v. BUTLER. T. T. 1685. K. B. 3 Lev. 290; S. C. 2 Vent. 344. S. P. LUG v. GOODWIN. Id. Raym. 393. S. P. CROSSE v. BILSON. 2 Ld. Raym. 1023. S. P. BLAKE v. RODENEAD.

The joinder in a demurrer was, in this case, objected to, on the ground that the demurrer alleged the insufficiency of the writ to put defendant to answer; and the joinder, by the Attorney-General was *quod bon' et sufficien' ad causand' literas patentes præd' cancelland' et vacand'.* The judges resolved, that sufficient appeared to put the matter in the hands of the Court.

3. BALDWIN v. CHURCH. H. T. 1714. K. B. 10 Mod. 324; S. C. 1 Str. 20.

In this case there was a demurrer to several pleas. The plaintiff, however, used the word *placitum prædictum* in the singular number. This was objected to. But the Court said, that the word *placitum* was *nomen collectivum*, and to be taken *reddendum singula singulis.*

4. CHEASLEY v. BARNES. T. T. 1808. K. B. 10 East, 73. S. P. SHORTRIDGE v. LAMPLUGH. M. T. 1702. K. B. 2 Ld. Raym. 798; S. C. Salk. 219; S. C. Comb. 64; S. C. 1 Com. 115. S. P. BROWNING v. DANN. Ca. Temp. Hardw. 167. S. P. WEDDALL v. JOCAR. 10 Mod. 268. S. P. GIBBS v. COPE. Comb. 297.

The plaintiff declared for a single act of trespass in each count, each of which was justified by the defendant in his several pleas. The plaintiff, in his replication, took issue on the facts of such justification, and also newly assigned several distinct acts of trespass. The defendant demurred specially, on the ground that each plea containing a distinct justification to the single act of trespass alleged in the first count, &c. the plaintiff had, by his replications and new assignments, attempted to put in issue several distinct acts of trespass.

The Court thought that such demurrer could not be impeached. See Com. Dig. Pleader, 2. 9; Rob. 232; 1 Salk. 219; 1 Saund. 160. n. 1. 337 n. 3.

XIII. AS TO WITHDRAWING A DEMURRER.

1. WILD v. NEDHAM. M. T. 1763. K. B. 1 Wils. 29; S. P. ANON. K. B. 5 Mod. 18; S. C. R. T. 5 & 6 G. 2. (b.) K. B.

There is a note in the margin to this case, stating that a defendant cannot waive a general demurrer, though he may a special one. See Rich. Pr. K. B. 255; Cro. Car. 513.

2. ANON. M. T. 1695. K. B. 2 Salk 515.

Per Cur. Before joinder in demurrer the defendant may waive his special plea, and plead the general issue. But if there be a rule to plead, and the commencement of a plea; see 1 Chit. Pl. 467; alleges that the declaration, and the matters therein contained and as therein stated, are not sufficient in law to enable the plaintiff to support his action; and concludes with a verification and an appropriate prayer of judgment though a verification is unnecessary; see Co. Lit. 716; 1 Leon. 24; or if the demurrer be to a particular count or breach, it is qualified accordingly. A general demurrer to a plea in abatement states, that it is not sufficient to quash the bill or writ, and prays judgment that the defendant may answer over or further to the declaration. To a plea in bar, the demurrer is *quia placitum, etc. materiaque in eodem contenta minus sufficiens in lege existet, etc. unde pro defectu sufficientis placiti, etc. petit judicium etc.*, either for damages, or debt and damages; &c., according to the nature of the action; see Co. Lit. 71. h. If the demurrer be to a replication, rejoinder, &c., after stating that the same and the matters therein contained are not sufficient in law, it concludes with a prayer of judgment, either against or for the plaintiff, according to the situation of the party demurring; see 1 Chit. Pl. 579.

* And after the passing of the statute of Elizabeth, a rule was made "that upon demurrers the causes shall be specially assigned, and not involved with general unapplied expressions of 'double,' 'negative pregnant,' 'uncertainty,' 'wanting form,' and the like: but shall show specially wherein, in order that the other party may, as the cause shall require, either join in demurrer, or amend, or discontinue his action." If the plaintiff demur to a plea in abatement, as if it had been a plea in bar, it will be a discontinuance; and a demurrer to such plea should conclude with praying judgment, that the writ or bill may be adjudged good, and that the defendant may answer farther, or over thereto; see 2 Saund. 119 n.; 1 Saund. 285. n.; 5 Hob. 56; 1 Chit. Pl. 587.

defendant pleads a special plea, and the plaintiff demurs, the defendant shall not then waive and plead the general issue.

3. *SHERLOCK v. TEMPLER*. M. T. 1736. C. P. Barnes, 337; S. C. Ca. Prac.

C. P. 135. S. P. *LITTLEHALES v. BOSANQUETT*. 2 Barnard. 134.

Defendant had demurred generally, and now moved for leave to withdraw the demurrer and plead the general issue. It was objected by plaintiff, that by this means he had been delayed of a trial at last assizes; but it appearing that the parties had been before a judge, and that defendant had offered to withdraw his demurrer and plead the general issue time enough for plaintiff to have tried his cause at last assizes, the motion was granted.

4. *HUNT v. PUCKMORE*. F. T. 1736. C. P. Barnes, 155; S. C. Ca. Prac. C. P. 141.

Plaintiff declared against defendant as heir, in debt, on the ancestor's bond; defendant pleaded *riens per descent*. Plaintiff replied assets. Defendant demurred to the replication, and plaintiff joined in demurrer, and the cause was set down to be argued. A motion was made for leave to withdraw the demurrer, and rejoin issuably on payment of costs, and a rule to show cause was obtained. Plaintiff, on showing cause, insisted that by the demurrer he had been delayed an assizes, and defendant now come too late to withdraw his demurrer, unless he would give judgment for plaintiff's security. Counsel urged a diffidence of his own opinion as to the validity of the pleadings, and was fearful to venture the argument, because, if judgment had passed against his client on demurrer, the debt must be paid out of the defendant's own goods; if on verdict, out of assets. The Court made the rule absolute.

XIV. JOINDERS IN.†

If the plaintiff or the defendant join in demurrer, the joinder concisely contradicts the demurrer.‡

XV. AS TO SIGNING AND DELIVERING.

All demurrers, whether general or special, must be signed by counsel in the King's Bench; *Per Cur.* T. 21 G. 3. K. B.; or a serjeant in the Common Pleas; *Douglas v. Child*, E. 33 G. 3. C. P.; *Allan v. Hall*, C. P. 346, 347. S. P.; and, in the King's Bench, general demurrers to the declaration must be delivered; 1 Chit. Rep. 212; 2 Chit. Rep. 295; on four-penny stamped paper; 35 Geo. 3. c. 184 Sched. Part II. & III; to the plaintiff's attorney; but special demurrers, or general demurrers after special pleas, must be filed

* And whether he be ruled or not, the defendant cannot waive a special demurrer, but in order to plead the general issue; 2 Tidd's Pr. 8th edit. p. 727.

† In the K. B., if the plaintiff demur, he may at once add the joinder in demurrer, and proceed to make up the demurrer-book; if the defendant, however, demur, and the plaintiff will not join in demurrer, the defendant's attorney may get a rule to join in demurrer from the master, on the back of the demurrer; take it to the clerk of the rules, who will enter it, and will mark on the back of the demurrer "entered;" and pay him 6d.; then serve a copy of it on the plaintiff's attorney or agent. This rule expires in four days, exclusive, after service; and if a joinder be not delivered or filed within that time, the defendant may sign judgment of *non pros*; or if the defendant wish the demurrer to be argued, he may make up the demurrer-book, adding the joinder, and deliver it to the plaintiff's attorney, with a rule to enter the issue; 2 Archibald's Pr. K. B. 2d edit. p. 6. In the C. P. a rule to join in demurrer is given with the secondaries, in like manner as to the rule to plead; and a joinder in demurrer should be demanded before judgment, and in that court a joinder in demurrer must have a serjeant's hand; 2 Tidd's Pr. 752. 8th edit.

‡ By stating that the declaration (or plea, &c.) and the matter therein contained in manner and form as stated are sufficient in law to bar the action, if the demurrer be to a declaration; or to quash the bill or writ, if in abatement; or to preclude the plaintiff from maintaining his action, if to a plea in bar; and usually offers to verify the declaration or plea, and concludes with a prayer of judgment, though the latter seems unnecessary; see Co. Lit. 71 b; 2 Wils. 74. A joinder to a replication to a plea in abatement should not conclude with praying judgment for debt and damages; for to conclude in chief in such case would be a discontinuance, and the plaintiff should pray judgment that the defendant may answer over; see 2 Saund. 210. q. But if the defendant has demurred to a declaration, and concluded his demurrer as in abatement, the plaintiff may join in bar, and shall have judgment accordingly; see 3 Leon. 223; 1 Chit. Pl. 580.

- [11] in the office of the clerk of the papers, who makes copies of them. In the Common Pleas, all demurrers, whether general or special, may either be filed in the prothonotaries office, or delivered to the opposite attorney; Imp. C. P. 347; Tidd's Prac. 752. 8th edit.

XVI. AS TO AMENDMENTS AFTER A DEMURRER.

The court will allow amend-
ments, upon payment of costs, after demurrer joined, where the pleadings are in paper

GODOLPHIN v. TUDOR. M. T. 1703. K. B. 6 Mod. 38. 234; S. C. 2 Salk. 468; S. C. 3 id 251.

A demurrer was joined in Easter Term. All continued in paper. A motion was now made to change the plea, and plead a matter issuable. The Court granted the motion on the terms prayed.

XVII. AS TO THE EFFECT OF A DEMURRER.

1. REX v. THE BISHOP OF ARMAGH. T. T. 1729. K. B. 2 Stra 842; S. P. PHILIBROWN v. RYLAND. 8 Mod. 354. S. P. REX v. KNOLLYS. 1 Lord Raym. 18. S. P. COPLEY v. DELANCEY. 2 Ld. Raym. 1056.

Per Cur. We allow that a demurrer is an admission that the facts alleged are true, and that, in such a case, the only question for the Court is, whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. But it must be remembered, that the rule is laid down with this qualification, that the matter of fact be sufficiently pleaded; wherever therefore, as in the case before us, it is not pleaded in a formal and sufficient manner, a demurrer is no admission of the fact. See Co. Lit. 72. a.; 5 Co. 69; Dy. 21; 5 H. 7. 1; Doct. Pl. 116; Hob. 81; Plowd. 13. b.; 85. a.

A demurrer admits all such matters of fact as are sufficiently pleaded.*

* But this is to be understood as subject to the alterations that have been introduced into the law of demurrer by the statutes mentioned ante p. 5. n., and therefore, if the demurrer be general instead of special, it amounts, it is said to a confession, though the matter be informally pleaded: 1 Saund. 337. b. n. (8); and therefore, if a man plead a demand of a rent, and that he was there before sunset, and continued there until sunset, and that no one was there on the other part, to which there is a demurrer, the whole fact alleged is thereby confessed, and the only thing that remains to be determined is whether it be a good demand; Plowd. 172. So, in assize, if the defendant do not traverse seisin and disseisin, but plead a recovery in bar, and the plaintiff confess and avoid the recovery by his replication, to which the defendant demurs, this is a confession of the seisin and disseisin; R. 2 Roll. 22. So, in assumpsit, stating a grant of 1000 trees to be cut down in three years, and that, having cut down 800, the defendant promised to allow him to cut down the remaining 200, if he would not cut them down then, to which the defendant pleaded that he had cut down the 1000 trees before the promise, and plaintiff demurs: the demurrer is a confession that he had cut down the 1000 trees before the promise; R. Yelv. 195. So in covenant, if the defendant plead covenants performed, and the plaintiff reply, assigning a breach, to which the defendant demurs; the defendant by his demurrer confesses the breach, and contradicts his own plea; R. Cro. Eliz. 829. In debt on a bond conditioned to pay if A. died without issue living, the defendant pleads that A. died, having issue living, *apud* B., and the plaintiff demurs for want of a good venue; the demurrer admits that A. had issue living at the time of his death; R. Dy. 15. a. So, in debt on bond, conditioned to pay within 20 days after the return of a ship, or at the end of 8 months, and that he paid within 20 days after; and the plaintiff replies, traversing the payments, to which the defendant demurs; the demurrer admits the breach, and it was therefore holden that the plaintiff should recover; R. 6 Mod. 349; Com. Dig. Pleader, Q. 5. So, in the waste, if the defendant demur to the declaration, and if it be determined against him, a writ of inquiry shall issue not to inquire of the waste, for that is confessed by the demurrer, but to inquire of damages only; 34 Hen. 6. 5. So, where in an action for criminal conversation, the defendant pleaded not guilty within six years; and the plaintiff joined issue on the first plea, and demurred to the second; and there was verdict for the plaintiff in the issue, but the demurrer was determined in favour of the defendant; it was holden that the defendant should have judgment on the demurrer, and that the plaintiff should not have judgment for his damages, because by demurring to the plea of the statute of limitations, he acknowledged that the action had not been commenced within the six years; 2 Wils. 85; and see Dy. 226. But if a count, plea, or replication, &c. be bad, a demurrer thereto is no confession of the matter alleged; R. 2 Roll. 22; 1 Leon. 80. And, therefore, if a plea in *quare impedit* show a title in the King, and the plaintiff demur; if the plea be bad, the demurrer is no confession of the King's title; R. 2 Rol. 22; R. Hob. 164. If a replevin suppose a taking in a place in A., and the advowry be for rent in B., and the plaintiff say that B. is within A., a demurrer thereon is not a confession of matter, which is repugnant and impossible, and the ground of the demurrer; R. 1 Sid. 10. So, a thing not material or traversable, is

2. ANON. H. T. 1763. C. P. 2 Wils. 150. S. P. BATES v. CORT. M. T. [12]
1824. K. B. 2 B. & C. 474.

Debt on bond, with condition for the payment of a certain sum of money on a certain day; the defendant pleaded payment before the day; plaintiff replied that the defendant did not pay before the day, *et de hoc ponit se super patriam*; defendant demurred and plaintiff joined in demurrer. It was for the plaintiff admitted that the plea at first was bad, but it was insisted that the plaintiff had made it good by replying and tendering issue upon it; or that, if the issue was immaterial, there ought to be a repleader. It was, however, urged that this was a case where defendant had not joined issue to the country, but had put himself upon the judgment of the Court, and though the replication was bad, yet whenever the case is upon a demurrer, the Court looks for the first fault, which is in the plea here; and, therefore, judgment ought to be for the plaintiff; and of that opinion was the Court, and gave judgment for plaintiff.

3. BELLASYSE v. HESTER. T. T. 1696, Ca. Prac. C. P. 1589. S. P. ROUTH v. WEDDELL. *ibid.* 1667. S. P. HASTROP v. HASTINGS. 1 Salk. 212. S. P. RICH v. PILKINGTON. Carth. 172.

The plaintiff demurred to a plea in abatement. The Court decided against the plea, and gave judgment of *respondeat ouster*, although a defect in the declaration was urged as fatal.

4. MARSH v. BULTEEL. H. T. 1822. K. B. 5 B. & A. 507.

On a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach, that the defendant would not pay the sum awarded; and the defendant pleaded, that, before the award made, he revoked by deed the authority of the arbitrators; to which the plaintiff demurred. The court held the plea good, as being a sufficient answer to the breach alleged, and therefore gave judgment for the defendant, although they also were of opinion, that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged by way of breach, that the defendant prevented the arbitrators from making their award.

court will not adjudge in favour of such right, unless the plaintiff have himself put his action on that ground.

5. HUMPHREYS v. BETHILY. T. T. 1689 C. P. 2 Vent. 198. and M. T. *ibid.* 222.

In this case the declaration was open to an objection of form, such as should have been brought forward by special demurrer—the plea bad in substance; and the defendant demurred to the replication. The Court gave judgment for the plaintiff, in respect of the insufficiency of the plea, without regard to the formal defect in the declaration.

XVIII. AS TO THE EFFECT OF PLEADING OVER.

1. GLASSCOCK v. MORGAN. E. T. 1663. 1 Sid. 18. S. P. FOWLE v. WELSH. M. T. 1822. K. B. 1 B. & C. 29. S. P. FLETCHER v. POOSON. T. T. 1824. K. B. 3 id. 192.

This was an action of trespass for taking a hook, where the plaintiff omitted to allege in a declaration that it was his hook, or even that it was in his possession; and the defendant pleaded a matter in confession and avoidance, justifying his taking the hook out of the plaintiff's hand. The Court, on motion in not confessed or admitted by a demurrer, when it is not traversed; R. 2 Salk. 561; Com. Dig. Pleader, Q. 6; Archibold's Pl. 318.

If the plea be bad, and the replication bad also, and the defendant demur, the plaintiff shall have judgment; 1 Str. 302. 817; 4 Co. 84. a; Cro Eliz. 815; 3 Lev. 244. R.; 1 Rol. 406; R. 2 Bulst. 288; R. 8 Co. 120. 133. b; R. 9 Co. 110. b; R. Poph. 209; and see Com. Dig. Pleader, M. 2; unless, indeed, the replication shows that he had no cause of action, R. 2 Cro. 133; R. 3 Co. 52. b; R. 8 Co. 133. b. 120. b; R. Lutw. 609; R. Hob. 14. 128; Poph. 41. 2; see Com. Dig. Pleader, 3.

† In the case of Powis v. Williams, Ca. Prac. C. P. 1301. a *quære* is added, whether a distinction would not exist where the nature of the plea is such, that it might be pleaded in bar?

‡ A party, though he has pleaded over without demurring, may, however, frequently avail

arrest of judgment, held that, as the plea itself showed that the book was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured.

2. ANON. T. T. 1700. K. B. 2 Salk. 519.

And all defects in form are aided by pleading over.

Per Holt, C. J. If a man pleads over he shall never take advantage of any slip in the pleading of the other side which he could not take advantage of upon a general demurrer. See Com. Dig. Pleader. C. 85; E. 37; Co. Lit. 303; b.; Prac. Rep. 351.

3. SPIERES v. PARKER. H. T. 1786. K. B. 1 T. R. 141. S. P. WESTON v. MASON. T. T. 1764. K. B. 3 Burr. 1725. S. P. JOHNSTONE v. SUTTON. M. T. 1786. Exch. Cham. 1 T. R. 545. S. P. NEROT v. WALLACE. H. T. 1789. K. B. 3 ibid. 17. S. P. JACKSON v. PESKED. H. T. 1813. K. B. 1 M. & S. 234. S. P. CAMPBELL v. LEWIS. H. T. 1820. K. B. 3 B. & A. 392; S. C. 3 Moore, 35. S. P. KEYWORTH v. HILL. T. T. 1820; ibid. 685. S. P. PIPPET v. HEARN. E. T. 1822. K. B. 5 B. & A. 634. S. P. LORD HUNTINGTOWER v. GARDINER. H. T. 1823. K. B. 1 B. & C. 297.

So faults in the pleading are in some cases aided by a verdict;*

Per Cur. After verdict nothing is to be presumed excepting what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. Thus, if a feoffment be pleaded with ut livery, a livery is always implied; because it makes a necessary part of a feoffment. So, if the grant of a reversion, a rent-charge, an advowson, or any other hereditament which lies in grant, and can only be conveyed by deed be pleaded, such grant ought to have been alleged to have been made by deed; and if not so alleged, it will be ground of demurrer; but if the opposite party, instead of demurring, pleads over, and issue be taken upon the grant, and the jury find that the grant was made, the verdict aids or cures the imperfection in the pleading; and it cannot be objected in arrest of judgment, or by writ of error.

[15]
But it is only where a fair and reasonable intendment can be made, that a verdict will have that effect.†

4. JACKSON v. PESKED. H. T. 1813. K. B. 1 M. & S. 234. S. P. NEROT v. WALLACE. H. T. 1789. K. B. 3 T. R. 25. S. P. WESTON v. NEASON. T. T. 1764. K. B. 3 Burr. 1725.

The plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated a certain himself of an insufficiency in the pleading of his adversary, either by motion in arrest of judgment, or motion for judgment non obstante veredicto, or writ of error, according to the circumstances of the case. And it has been also seen (*supra*, p. 12. n.) that upon a demurrer arising at any subsequent stage of the pleading, the Court will take into consideration the sufficiency in law of matters to which an answer in fact had been given.

* The extent and principle of this rule of aid by verdict, is thus explained in a modern decision of the Court of King's Bench.—where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there a want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial; Jackson v. Pesked, 1 M. & S. 234. In entire accordance with this, are the observations of Mr. Sergeant Williams. "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict;" 1 Saund. 228. n. (1); Stephen's Pl. 180.

† Lastly, it is to be observed that, at certain stages of the cause, all objections of form are cured by the different statutes of jeofails and amendments; the cumulative effect of which is to provide that neither after the verdict, nor judgment by confession, nil dicit, or non sum informatus, can the judgment be arrested or reversed by any objection of that kind. Thus, in an action of trespass, where the plaintiff omits to allege in his declaration on what certain day the trespass was committed, which is a ground of demurrer, and the defendant, instead of demurring, pleads over to issue, and there is a verdict against him, the fault is cured by statutes of jeofails, (3 Bl. Com. 394; 1 Saund. 228. c. n. (1); where Mr. Sergeant Williams corrects a mistake in the passage of Bla. Com.) if not also by the mere effect of pleading over: Stephens' Pl. 182.

tain injury to have been committed; but omitted to allege that the reversion was, in fact, prejudiced, or to show any grievance which, in its nature, would necessarily prejudice the reversion; the Court arrested the judgment, after a verdict had been given in favour of the plaintiff, and held the fault to be one which the verdict could not cure.

XIX. ARGUMENT ON.

(A) AT WHAT TIME.

BURDETT V. COLEMAN. M. T. 1810. K. B. 13 East, 27.

The plaintiff brought three actions of trespass against three several defendants, for different parts which they took in the same transaction: one, against the Speaker of the House of Commons, who justified under a warrant he had issued by order of the House, for arresting and committing to the Tower the plaintiff, a member of the House, for a breach of privilege, in publishing a libel upon the House; to which plea the plaintiff demurred; another against the Sergeant at Arms, who pleaded not guilty, and also justified under the authority of the Speaker's warrant; to which the plaintiff replied an excess in the manner of executing the warrant, by a military force, and with improper and unnecessary violence; on which issue was joined to the country; and the third, against the Constable of the Tower, who received and retained the plaintiff as a prisoner, and who also justified under a warrant from the Speaker for that purpose; on which issue was also taken to the country, on several facts stated in such justification, and notice of trial was given by the plaintiff in the two last causes, which stood for trial at bar on a day fixed; but the plaintiff, though still within the time allowed by the general rules and practice of the Court, had not set down his demurrer in the first cause for argument. The Court, on the motion of the Attorney-General on behalf of the Sergeant at Arms and Constable of the Tower, postponed the trial of the issues in these causes, until after the argument of the demurrer against the Speaker; because the right, just, and distinct consideration of the question which arose on the issues of fact, and the true measure of damages in the causes against the Sergeant at Arms and the Constable of the Tower depended, in a great measure, upon the decision of the issue in law joined in the other action against the Speaker; and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the Court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer, which presented the question of law distinct from the question of fact.

(B) IN THE KING'S BENCH.

1st. Concilium.

(a) Motion for.

The concilium, dies concilii, a day to hear the counsel of both parties, was

* Formerly there had been a great diversity of opinion upon the question, when there were several issues in law and in fact, which of them should be first tried or determined; see Co. Lit. 72. a.; Gilb. C. P. 57. But now, where there are several issues in law and in fact, it is optional with the plaintiff which he will have determined first; see 2 T. R. 394; 2 Saund. 300. (n. 3.). In practice, however, it is usual and advisable, when there are several issues in law and in fact, and the course of the proceeding rests with the parties to determine the issue in law first, for the following reasons: first, that the determination of an issue in law is generally more expeditious and less expensive than the trial of an issue in fact; secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact, whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue at law; and if that be found against him, he will not be allowed his costs of the trial of the issue in fact; see 2 Saund. 300; 2 Marsh. 364: thirdly, that this mode of proceeding will prevent confusion and embarrassment at the trial, particularly when contingent damages are to be assessed: and, lastly, that whether the demurrer go to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the Court are of opinion against him, he may amend as at common law; but after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendments; see 2 Blac. 920; Tidd. Prac. 795.

Where three actions were brought against three defendants for different parts they had taken in the same transaction in one of which issue was joined on a demurrer, and issues in fact on the other two, the court on application of the defendant, ordered the demurrer to be argued first.* as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions.

[17] formerly moved for in the K. B., upon reading the record in court; see Reg. Gen.; 2 Jac. 2; 2 Lil. P. R. 421; but now it is a motion of course, which only requires a counsel's signature. Still, however, the record is taken *pro forma* to the clerk of the papers, who marks it "read," and signs the initials of his name on the brief, or motion paper, which being carried to the clerk of the rules, he draws up the rule of a *concilium* thereon.

(b) *Rule for.*

The rule for a *concilium* is a four day rule. It has been determined not to be necessary to serve the rule for a *concilium* upon demurrer in the K. B., or to give notice of putting it in the paper, it being in strictness the defendant's duty to search, since he must expect the plaintiff will proceed; see 2 Stra. 1242; 1 Chit. Rep. 718; but in practice it is usual to serve a copy of the rule on the defendant's attorney, and it seems that it ought to be served, when there is a real demurrer; see Imp. K. B. 355.

(c) *Signing.*

Signing a *concilium* is considered in K. B. as a step in the cause, so as to make it unnecessary to give a term's notice; see 3 T. R. 530.

2d. *Entering cause for.*

The cause is entered for argument with the clerk of the papers; see Tidd. Prac. 796. Copies of the demurrer-book on brief paper must next be delivered to the judges; by the plaintiff's attorney to the chief justice and senior judge, and by the defendant's attorney to the other two judges; see Arch. Prac. K. B. 214. 215. The party demurring must enter the exceptions intended to be insisted on an argument in the margin of the demurrer-books which he delivers to the judges; see 1 Smith's Rep. 361. And if each party intends to take objections to the other's pleadings, each should state his objections in the margin of his paper-books, &c. as above stated; see 7 Taunt. 72. Afterwards, upon some Tuesday or Friday in term, the demurrer will be called on for argument, in the order in which it stands on the paper. And if argued, the counsel for the party demurring is first heard in support of the demurrer; next the counsel for the other party is heard in answer; and, lastly, the former counsel is heard in reply. One counsel only on each side is allowed to argue the demurrer; see Arch. Prac. K. B. 9. Those demurrers which are not intended to be argued are set down on a paper, called the common paper, and are called on and disposed of before a single judge in the early part of the day: those which are to be argued are set down on the special paper, and argued before the full court; see *ibid.*

3d. *Motion for judgment.*

If there be no argument, the counsel moves for judgment as of course; see 1 Arch. Prac. K. B. 9; and if either party neglect to deliver the books, and the other deliver all; the latter, it seems, may move for judgment upon the demurrer without argument, for the former cannot be heard; see 1 Sellon, 836.

[18]

(C) In C. P.

In C. P., the record is brought into court by the clerk of the dockets, on moving for a *concilium*, which is a motion of course, requiring only a serjeant's name; and, the motion paper being handed to one of the secondaries, he will mark the roll as *read* in court; after which, the rule is drawn up, with the secondary, and a copy of it served on the defendant's attorney; and, at the time of drawing up the rule, the secondary will set down the cause for argument in the court-book. This must be done four days exclusive before the day of argument. All special arguments on demurrers, and other special arguments, are, by a late rule, to be heard in the Common Pleas, on the day next before the sitting day at *nisi prius* in Middlesex, and the day next after the sitting day at *nisi prius* in London, and on no other days; and no argument is allowed in that court, on the four last and four first days of the term; but, if a sham demurrer be put in towards the end of the term, the Court, on its being mentioned by a serjeant, on moving for a *concilium*, will, it seems, order it to be argued on the last day of term; see Imp. C. P. 348. 352. It is a rule in the Common Pleas, that the plaintiff's attorney shall deliver all the demurrer

books to the lord chief justice and the rest of the judges, and the names of the sergeants who signed the pleadings are to be inserted therein, and the number, roll, and day of argument set down on the outside of each book; see Barnes, 164. The exceptions intended to be insisted upon in argument should also, as in the King's Bench, be marked in the margin of the books; see 1 Taunt. 203; and if each party take objections to the pleadings of the other, it is said to be the duty of each to deliver books, with the points intended to be made on both sides, stated in the margin; see 7 Taunt. 72, 73; which books, by a late rule; see 1 Taunt. 412; are to be delivered to the lord chief justice and the other judges, two days (exclusive of the day of such delivery) before the day on which the cause shall have been set down for argument. It was formerly a rule in both courts that the party neglecting to deliver books could not be heard, until he had paid for two copies of them. But a subsequent rule having declared that no judgment should be signed for the non-payment of the issue money, the courts, in the construction of this latter rule, have held it to extend to the paper books on a demurrer; see 6 T. R. 477; 1 Bos. & Pul. 292; and of course, if they are not paid for, the costs of them must remain to be taxed, like the issue money, as part of the costs in the cause; see Tidd. Prac. 798.

XX. JUDGMENTS ON.

(A) IN ABATEMENT.

The nature of the judgment for plaintiff on demurrer in abatement has been already noticed, *vide ante*, vol. 1. p. 69.

(B) IN BAR.

1st. Rule for.

The Courts having given their opinion on the demurrer, a peremptory rule is drawn up with the clerk of the rules in K. B., or secondaries in C. P., that judgment be entered for the plaintiff or defendant, as the case may be; see Tidd. Prac. 798.

2. Interlocutory.

(a) Signature of.

If the action be for damages in *assumpsit*, &c., the judgment is interlocutory, and the plaintiff, after giving a peremptory rule for judgment with the clerk of the rules in the K. B., or secondaries in C. P., should sign interlocutory judgment on four-penny stamped paper with the clerk of the judgments in the former court; see 1 Sel. Prac. 375; or prothonotary in the latter; and proceed to execute the writ of inquiry for assessing the damages; see Barnes, 229; or in an action on a bill of exchange or note, he may have them assessed by reference to the master; see 1 H. Bl. 541; Tidd. Prac. 798.

(b) Motion in arrest of judgment.

After interlocutory judgment on demurrer, the defendant cannot move to arrest the judgment, on return of the inquiry, for any exception that might have been taken on arguing the demurrer; see Tidd. 798.

3d. Final.

The judgment is final in an action of debt for a certain sum; see Tidd. Prac. 799.

XXI. COSTS ON.

If either plaintiff or defendant have judgment upon demurrer, he shall be entitled to costs, and he may have execution for the same by *capias ad satisfaciendum*, *feri facias*, or *elegit*; see 1 & 9 W. 3. c. 11. s. 3; this statute, however, does not extend to demurrers in abatement, nor to actions where the plaintiff could not be entitled to damages, if he had verdict; *vide ante*, vol. 1. p. 73; and Hullock on Costs, 145, 146. And where a defendant pleaded, at the assizes, a plea *puis. dar. cont.* to which the plaintiff replied, and the defendant demurred to the replication, and had judgment; on the demurrer, it was holden that he was entitled to costs since the plea *puis. dar. cont.* only; see 6 D. & R. 81; Arch. Prac. K. B. 286. Where the judgment is final,

[20] the plaintiff in K. B., after giving a peremptory rule for judgment, should get it stamped with a 10s. stamp, and may immediately proceed to tax his costs; and the master, having the roll brought to him by the clerk of the treasury, will mark the amount of the costs thereon as well as upon the rule; see Imp. K. B. 358. In the C. P. the plaintiff, after drawing up the rule with the secondaries, should procure a 10s. stamped paper, enter an *incipitur* thereon, and get it marked by the clerk of the warrants, and then take it to the prothonotaries, and their clerk will sign the judgment, upon which the prothonotaries will tax the costs; see Tidd. Prac. 799.

XXII. OF WRIT OF INQUIRY ON DEMURRER.

On the execution of a writ of inquiry after judgment on demurrer, the defendant is not allowed to controvert any thing but the amount of the sum in demand; see 1 B. & P. 368.

A demurrer to evidence admits the truth of every conclusion of fact which the jury could have inferred from the evidence demurred to.

Demurrer to Evidence.

1. COCKSEGE V. FANSHAW. E. T. 1745. K. B. 1 Doug. 119.

So that on a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the proposed evidence conduces to prove.

Per Cur. It is the province of a jury alone to judge of the truth of facts and the credibility of witnesses, and the party cannot by a demurrer to evidence, or any other means, take that province from them, and draw such questions *ad aliud examen*. I think the plain and certain rule is this: The demurrer admits the truth of all facts which, upon the evidence stated, might be found by the jury in favor of the party offering the evidence.

2. GIBSON AND JOHNSON V. HUNTER. T. T. 1793. C. P. 2 H. Bl. 187.

This was an action by Hunter, the defendant in error, as indorsee, against Gibson and Johnson, as acceptors of a bill of exchange. At the trial, the plaintiffs in error demurred to the evidence. The instrument was in the words and figures following:—

Two months after date pay to Mr. Will, Fletcher, or order, five hundred twenty-one pounds, 7s. value received, with or without advice. (Signed) Nath. Hingston. The bill was directed to Messrs. Gibson and Johnson, bankers, London. The demurrer stated the following indorsements: "William Fletcher," "A Goodrich." And the said Hunter, to prove the issue within joined on his part, shows in evidence, by Robert Booth, a witness, clerk to Livesey, Hargreave and Co.: that Nathaniel Hingston drew the same as agent to Livesey, Hargreave, and Co.: that Livesey, Hargreave, and Co., used to send down to the said Nathaniel Hingston blank bills of exchange for him to sign as the drawer thereof; that many such blank bills were sent down together: that when they were returned to Livesey, Hargreave, and Co., they filled up the blanks with the sum to be paid, and the name of the persons to whom the same was to be payable; that when the bills were so drawn and filled up, they were carried indiscriminately with other bills, to the house of the defendants, for their acceptance; that Livesey, Hargreave, and Co., gave defendants advice of the bills so drawn by the said Nathaniel Hingston; that such bills, indiscriminately with the said other bills, used to be carried two or three times a day from the house of Livesey, Hargreave, and Co., to the house of defendants for acceptance, and were often carried wet; that the acceptance of the bill produced was the acceptance of the defendants; that Robert Booth, upon those occasions, used to see the defendant Johnson: that Livesey, Hargreave, and Co., were generally indebted to the defendants upon the balance of accounts, for cash advanced by the defendants to the said Livesey, Hargreave, and Co.: that the defendants were covered for these acceptances by bills of Exchange given as a security for the same, but that the bills so given as a security have not been paid; that no such person as William Fletcher, in the instrument and indorsement named, existed; and that the name William Fletcher, so indorsed, was not the hand-writing of any person of the

* A demurrer to evidence is a proceeding by which the judges, whose province it is to determine questions of law, are called upon to declare what the law is upon the facts in evidence; see 1 Phillip's Ev. 234; 5 Co. 104. On a demurrer to evidence, the Court may draw the same inference that the jury would have drawn; see 3 T. R. 182. And the party cannot take advantage of any objection to the pleadings; see Doug. 218.

name of William Fletcher. And the said Hunter further shows in evidence, by one Stephen Barber, that he negotiated the instrument now produced with the plaintiff Hunter, that he carried it from Livesey, Hargreave, and Co., to get it discounted for them; and that he told Hunter from whom he came: that Hunter gave him the value for the instrument in money, and he took it back to be indorsed by Livesey, Hargreave, and Co.: and that it was indorsed by Absalom Goodrich, by procuration of Livesey, Hargreave, and Co.; that the instrument had been accepted by defendants before it was carried to be discounted. And defendants say, that the aforesaid matters are not sufficient in law to maintain the said issue within joined on the part of Hunter, and that they, to the matters aforesaid, have no necessity, nor are they obliged, by law, to answer; and this they are ready to verify, &c. Wherefore, for want of sufficient matter in that behalf shown in evidence to the jury aforesaid, the said Thomas Gibson and Joseph Johnson pray judgment, &c., and the said Hunter, for that he hath shown sufficient matter, &c. prays judgment, &c. And the said Hunter, for that he hath shown sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said defendants do not deny. And thereupon all and singular the premises being seen by the said Court of our said lord the King, before the King himself, now here fully understood and considered, it seems to the said Court here, that the aforesaid matter to the jury aforesaid, in form aforesaid, shown in evidence by the said Hunter, is sufficient in law to maintain the said issue above joined, on the part and behalf of the said Hunter. Therefore it is considered by the said Court of our said lord the King, before the King himself here, that the said Hunter doth recover his aforesaid damages, by the jury aforesaid, in form aforesaid, assessed. This demurrer to evidence was set down for argument before the Court of King's Bench; but it being the understanding that a writ of error was to be brought, the Court gave judgment for the defendant in error, without argument. Upon this judgment a writ of error was brought in parliament; and Lord Chief Justice Eyre delivered the unanimous opinions of the judges:—The questions arise upon a proceeding, which is called a demurrer to evidence, and which, though not familiar in practice, is a proceeding well known to the law. It is a proceeding, by which the judges, whose province it is to answer to all questions of law, are called upon to declare, what the law is upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading. In the nature of the thing, the question of law to arise out of the fact, cannot arise till the fact is ascertained. It is the province of a jury to ascertain the fact, under the direction and assistance of the judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence and a bill of exceptions, the distinct lines of which have not always been kept so much apart as they ought to have been. In the first stage of that process, under which facts are ascertained, the judge decides, whether the evidence offered conduces to the proof of the fact which is to be ascertained: and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained is not for the judge to decide, but for the jury exclusively; with which judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury; in attaint; upon motions for new trials. When the jury have ascertained the fact; if a question arises whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact (the question of law involved in the issue depending upon the true state of the fact) is in favour of one or other of the parties; that question is for the judge to decide. Ordinarily, he declares to the jury what the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury, and to refer to the judge, the application of the law to the fact. In the nature of things,

therefore, and reasoning by analogy to other demurrers, and having regard to the distinct functions of judges and of juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained.

[23]

The main question proposed to the judges is, "Whether, upon the state of the evidence given for the plaintiff in this case, it was competent to the defendants to insist upon the jury's being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer?" Your lordships' question is confined to this particular case; but it will be necessary for me to proceed by steps. All our books agree, that if a matter of record, or other matter in writing, be offered in evidence, in maintenance of an issue joined between the parties, the adverse party may insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering the evidence to join in demurrer. He cannot refuse to join in demurrer; he must join, or waive the evidence. Our books also agree, that, if parol evidence be offered, and the adverse party demurs, he who offers the evidence may join in demurrer if he will. We are therefore thus far advanced, that the demurrer to evidence is not necessarily confined to written evidence; The language of our books is very indistinct upon the question, whether the party offering parol evidence should be obliged to join in demurrer. Why is he obliged to join in demurrer, when the evidence which he has offered is in writing? The reason is given in Croke's report of Baker's case; Cro. Eliz. 753; S. C. 5 Co. 104; because, says the book, "there cannot be any variance of matters in writing." So this applies to parol evidence, which is certain; but it does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet, if there can be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury, and transferred to the judges. But if the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate; or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in demurrer will then apply, and the doctrine of demurrers to evidence will be uniform and consistent. That this is the regular course of proceeding, may be collected from Baker's case, and Wright v. Pindar, Aleyn, 18; S. C. Style, 22.

My Lords, the answer is, "That, upon the state of the evidence given for the plaintiff in this case, it was not competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence and obliging the plaintiff to join in demurrer, without distinctly admitting upon the record every fact, and every conclusion, which the evidence given for the plaintiff conduced to prove."

Demur Mark. See *Right Writ of.*

Denial. See *tit. Bankrupt; Lien; Payment; Pleas; Set-off; Tender; Trover.*

Denizen and Denization. See *tit. Naturalization and Denization.*

[24]

All things which move *ad mortem* are forfeited as deodands.*

Deodaud.

1. THE LORD OF THE MANOR OF HAMPSTEAD'S CASE. T. T. 1703. K. B. 1 Salk. 220.

A cart met a loaded waggon upon the road, and the cart, endeavouring to pass by the waggon, was driven on a high bank, and overturned. The person that was in the cart was thrown just before the wheels of the waggon, and the waggon ran over the man and killed him.

* By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature, which is forfeited to the King, to be applied to pious uses, and dis-

Pollexfen, C. J., and Gregory, J., gave their opinions, that the cart, wagon, loading, and all the horses, are deodands, because they all contributed to his death. Pollexfen at first doubted concerning the forfeiture of the cart; but, looking into his common-place book, he grounded his opinion on this case:—One riding upon a horse in a river, the horse threw him, and the stream carried him to a mill, and the wheel of the mill killed him; and it was adjudged that the horse and the wheel were forfeited. If a man be thrown from his horse by the violence of the water, then the horse is not forfeited; 2 Cro. 483. Lord Chando's case; where the inquest found him killed by the stream of the water. It is said in the books, that if a tree shall fall on the branch of another tree, and both fall to the ground, and the branch kills a man, the tree and branch are both forfeited.

2. **REX v. WHEELER.** T. T. 1704. K. B. 6 Mod. 187.

It appeared on an inquisition before the coroner, on view of the body, that the wheel of a forge caused the death of the deceased. And now it was moved to stay process for seizing it as a deodand, because parcel of a freehold, as the wheel of a mill, or mill-stone, which were agreed to be freehold, and therefore not capable of being a deodand. Holt, C. J. A mill is a known thing in law, and so are the parts thereof; and, therefore, if the owner of a mill take out one of the mill-stones to pick or gravel it, and devise the mill while the stone is severed from it, yet it shall pass as part of the mill.

3. **REX v. CHURCHWARDENS OF AXMINSTER.** H. T. 1664. K. B. 1 Lev. 136; S. C. Raym. 97. **S. P. REX v. WHEELER.** T. T. 1704. K. B. 6 Mod. 187.

The deceased, whilst ringing a bell in the church, was strangled with the rope. On the question, what should be the deodand, whether the rope or bell, or both? Hyde, C. J. and Wyndham, J., were of opinion, that the bell was not forfeited. The other two seemed to be of a contrary opinion. But no judgment was given.

tributed in alms by his high almoner, though formerly destined to a more superstitious purpose; see 1 H. P. C. 419; Fleta. lib. 1. c. 25. It seems to have been originally designed as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to the holy church, in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due when an infant, under the age of discretion, is killed by a fall from a cart, or horse, or the like, not being in motion; whereas, if an adult person falls from thence, and is killed the thing is certainly forfeited; see 3 Inst. 57; 1 H. P. C. 422; such infant being presumed incapable of actual sin, and therefore not needing a deodand to purchase propitiatory masses; 1 Comm. 300. Thus stands the law, if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion kill as well an infant as an adult; or if a cart run over him, they shall, in either case, be forfeited as deodands, which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner; and therefore he is properly punished by such forfeiture; Bract. L. 3. c. 5. Where a thing not in motion is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand; 1 H. P. C. 422. But wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over his body), but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited; 1 Hawk. P. C. c. 26. It matters not whether the owner of the thing moving to the death of a person were concerned in the killing or not; for, if a man kills another with my sword, the sword is forfeited; Dr. & Stud. d. 2. c. 51. And, therefore, in all indictments for homicide, the instrument of death and the value are found and presented by the grand jury (as that the stroke was given by a certain penknife, value sixpence), that the King, or his grantee, may claim the deodand; for it is no deodand, unless it be presented as such by a jury of 12 men; 3 Inst. 57; 5 Rep. 110; 1 Inst. 144. No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law; but, if a man fall from a boat, or ship, in fresh water, and is drowned, it hath been said that the vessel and cargo are, in strictness of the law, a deodand; 3 Inst. 58; 1 H. P. C. 428; Moll. de-Jur. Marit. 2. 225.

Juries have, however, of late, perhaps too frequently, taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. But, in such cases, although the finding by the jury be hardly warranted by law, the Court of King's Bench hath generally refused to in error, on behalf of the Lord of the Franchise, to assist so unequitable a claim; Fost. on Homic. 266.

At any rate a deodand cannot be given in evidence to the trespass for taking goods.

4. *DRYER v. MILLS*. T. T. 1718. K. B. 1 Stra. 61.

In an action for trespass for taking the materials of a house; on not guilty pleaded, Parker, C. J., would not admit the defendant to give evidence of taking the goods as a deodand, because he might have justified, and then the trespass for plaintiff would have had an opportunity to have given an answer to it.

Departure. See tit. *Insurance*.

Departure in Pleading. See tits. *Pleas; Replications; Variance*.

Depasturing, Right of. See tit. *Common*.

Deposit. See tits. *Execution; Payment of Money into Court; Principal and Agent; Pawnbroker*.

[26] **Deposit in lieu of Bail.**

I. BAIL BELOW.

(A) OF ITS NATURE, p. 26.

(B) WHEN, AND HOW, TAKEN OUT OF COURT, p. 28.

(C) EFFECT OF IT, ON THE PROCEEDINGS IN THE CAUSE, p. 31. n.

II. BAIL ABOVE, p. 31. n.

III. RETURN OF SHERIFF, p. 32. n.

I. BAIL BELOW.

(A) OF ITS NATURE.

1. *SLACKFORD v. AUSTEN*. M. T. T. 1808. K. B. 14 East, 468. S. P. Wood-
EN v. MOXON. H. T. 1816. C. P. 6 Taunt. 490; S. C. 2 Marsh. 186.

An action against a sheriff for an escape. The plaintiff had issued a writ by which the defendant was commanded to take and keep the body of one A. B., so that he might have him on a certain day at Westminster, to satisfy the plaintiff of his damages, &c. The defendant, before the return day, received the money due from his prisoner; and therefore liberated him, before he had paid it over in satisfaction to A. B. The return defendant made was, that he took and detained the prisoner until he satisfied him (the sheriff) the sum indorsed on the writ for execution. A verdict had been given for defendant. A rule to set it aside was now made absolute by the Court, who said: the writ has not been complied with. The sheriff is strictly no agent of the plaintiff's, but the officer of the Court, for the execution of its process; and he cannot substitute one mode of proceeding in lieu of another which he is commanded to pursue. No authority can be shown to warrant the sheriff in levying upon the goods under a writ against the person. Then can the plaintiffs, who elected to take out their writ against the person of their debtor have, by the mere act of the sheriff, his own responsibility substituted in the place of the body of their debtor. The best way would have been, for the sheriff, after having fallen into the error he had committed, to have taken the earliest opportunity of moving the Court to stay proceedings, on payment to the plaintiffs of their original demand, and of all subsequent costs incurred on bringing the money into court.

2. *WAIN v. BRADBURY*. H. T. 1804. K. B. 1 Smith. Rep. 128.

This was a rule calling upon the sheriff of Middlesex to bring into court the money deposited in this case in lieu of bail, for the purpose of being paid over to the defendant, the defendant having put in bail. The attorney for the defendant swore that the defendant, being arrested, went to him, and advised him to make a deposit, and gave orders that the sheriff's office should be searched at seven o'clock the next morning, in order that the deposit might be made as speedily as possible; that he afterwards called upon him, and made a deposit of the debt, and 10*l*. The sheriff's officer, on the other hand, swore that nothing was said, at the time, concerning a deposit, and that he received the money as payment of the debt and costs, and had paid it to the plaintiff. There was no receipt, or acknowledgment, in writing, given on either side. It was urged, amongst other objections, that the defendant had not sworn to the merits of the case. *Per Cur.* As there was not any discharge, or receipt, given to the de-

But now, defendant may be discharged upon deposit [27] ing with the sheriff the sum indorsed on the writ, and 10*l*. to answer costs, or what may have been paid

defendant, to show that he had paid the debt and costs, it must be presumed, that the money was paid under the act of parliament. The sum paid is what was the exact sum contemplated by the act of parliament: it is the debt and the 10*l*.; and, we think that something like this should be understood, that it will be presumed that the money was taken under the act, unless a discharge is given, or something to show that the money is not paid under the act, in order to prevent it from being converted into an engine of great oppression. And, as to the objection, that the defendant did not swear to merits, this is not necessary where money is paid as a deposit, and it is claimed as an absolute payment.—Rule absolute.†

(B) WHEN, AND HOW, TAKEN OUT OF COURT.

1. HARFORD AND OTHERS V. HARRIS. M. T. 1812. C. P. 4 Taunt. 669.

Defendant being arrested, paid the debt and costs to the sheriff's officer under the stat 43 Geo. 3. c. 46. s. 2. and afterwards put it bail, who were excepted to, and not justifying, surrendered their principal. This rule was obtained for the payment so made by the defendant to be handed over to the plaintiff, on the ground that the surrender of the principal was a perfecting bail within the meaning of the statute. *Per Cur.* This statute was made for the benefit of the defendants, and we consider this as a fulfilment of the statute's intent.—Rule discharged with costs.

sum so deposited with him; and if the defendant afterwards duly put in and perfect bail;

2. CHADWICK V. BATTYE. M. T. 1814. K. B. 3 M. & S. 283. S. P. GOULD V. BERRY. H. T. 1819. K. B. 1 Chit. Rep. 145. S. P. HARFORD V. HARRIS. M. T. 1812. C. P. 4 Taunt. 669. S. P. HILL V. CHINE. M. T. 1822. C. P. 1 Bing 103. S. P. EDELSTEN V. ADAMS. M. T. 1818. C. P. 8 Taunt. 557.

It was contended in this cause that a defendant who had put in bail, and afterwards rendered in his discharge, was not entitled to have the money depo-

* By the stat. 43 G. 3. c. 46. s. 2. reciting that it is expedient that persons arrested should, upon making such deposit, be permitted to go at large, until the return of the writ, without finding bail to the sheriff for their appearance at the return thereof, it is enacted that "all persons who shall be arrested upon mesne process, within those parts of the united Kingdom of Great Britain and Ireland, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him, or to his under-sheriff, or other officers to be by him appointed for that purpose, the sum indorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with ten pounds in addition to such sums, to answer the costs which may accrue, or be incurred, in such action, up to and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the King's fine upon any original writ, and shall thereupon be discharged from such arrest, as to the action in which he, she, or they, shall so deposite the sum indorsed on the writ;" and that "the sheriff shall, in every such case, at or before the return of the said writ, pay into the court in which such writ shall be returnable, the some of money so deposited with him as aforesaid; and thereupon, in case the defendant or defendants shall afterwards duly put in and perfect bail in such action, according to the course and practice of such Court, the sum of money so deposited and paid into court as aforesaid shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant or defendants; but, in case the defendant or defendants shall not duly put in and perfect bail in such action, then, and in such case, the said sum of money so deposited and paid into court as aforesaid, shall by order of Court, upon a like motion to be made for that purpose, be paid out to the plaintiff or plaintiffs in such action, who shall be thereupon authorised to enter a common appearance, or file common bail for such defendant or defendants, if the said plaintiff or plaintiffs, shall so think fit; such payment to the plaintiff or plaintiffs to be made subject to such deductions, if any, from the sum of ten pounds deposited and paid, to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the Court, in that behalf, may be found reasonable."

† "This has been sometimes erroneously called my act. The truth is, I altered these clauses a little, and made them less mischievous than otherwise they would have been. But I am afraid they are productive of more mischief than good, after all."—*Per Lord Ellenborough, C. J.; 1 Smith, 128.*

‡ For this purpose give a brief to counsel, to move for a rule nisi, upon an affidavit stating the arrest; deposit; payment of it into court; and that bail has been put in and perfected; or that the defendant has rendered; as the case may be; draw up the rule with the clerk of the rules, and serve a copy of it on the plaintiff's attorney; afterwards move to make the rule absolute upon affidavit of service, and take the money out of court in the usual way.

for the king's fine* and when money is so paid, it shall be presumed to have been paid for that purpose, unless a receipt be given for the debt and costs.

The sheriff, on or before the return day of the writ, shall pay in to court the

Or render himself; he may obtain the money back again upon motion.‡

sited in the hands of the sheriff in lieu of bail repaid to him under the 43 Geo. 3. c. 46. sec. 2. as that act only allowed the defendant to move the court for such a purpose when he had duly put in and perfected bail; and it was urged that the legislature did not intend that the defendant should have the alternative of rendering his person, or perfecting bail, as in other cases.

Per Cur. The statute 43 Geo. 3. c. 46. s. 2. which allows the deposit to be made, directs that it shall be returned in case the party shall duly put in and perfect bail; and though the present surrender does not meet the letter, it meets the spirit of the act, and is a substantial compliance with its directions, since the security in lieu of which the deposit was made, the defendant's person, is thereby attained.

3. NUNN v. POWELL. M. T. 1803. K. B. 1 Smith. Rep. 13. S. P. EDELSTEN v. ADAMS. M. T. 1818. C. P. 2 Moore, 610; S. C. 8 Taunt. 557.

And where money is so deposited by a third person the court will, upon bail being put in and [29] perfected, order it to be repaid to the person by whom it was actually deposited instead of the defendant;

A rule was obtained calling upon the sheriff of the county of L. to show cause why certain sums of money deposited in his hands under the statute 43 Geo. 3. c. 46. s. 2. in lieu of bail for the appearance of the defendant, should not be paid over to him, the defendant having put in and perfected special bail, and having surrendered in discharge of his bail. By the affidavit it appeared that it was the money of the applicant himself which had been deposited for the above purpose. But it was also shown by the affidavit of one A. B. that he had been arrested as the drawer of a bill of exchange, drawn on and accepted by the applicant for goods purchased by the former for the latter's use, and delivered to him; in consequence of which, A. B. now insisted upon an equitable claim to the money. It was, however, urged on behalf of the defendant, that the words of the act "upon perfecting bail, the money so deposited shall by order of the Court, upon motion made, be repaid to such defendant," imported that the Court could only look to him as the party interested in it.

Sed per Cur. The act means that it should *bona fide* be repaid to the person who has actually deposited it to him whose property it really is. As to the other claims upon the money, we cannot enter into them upon the present application.—Rule absolute.

3. EDELSTEN AND ANOTHER v. ADAMS. M. T. 1818. C. P. 2. B. Moore, 610; S. C. 2 Taunt. 557.

Though he became bankrupt after the money was paid.

The debt and costs in this cause having been paid into court under statute 43 Geo. 3. c. 46. s. 2. by a friend of the defendant, and the defendant having subsequently put in bail, and surrendered himself, a rule nisi that the money might be returned. The opposition was grounded on an affidavit that the defendant had become bankrupt since the money was paid, and that such being the case, the assignees only of the defendant were entitled to receive it.

Per Cur. Our power in these cases is derived wholly from the statute, and as no case occurs of the Court ordering a detention of the money by the sheriff, we are at liberty to decide on equitable principles. The question is simply whether the plaintiff has a right to retain the money, and by virtue of the statute he has not; all ulterior considerations must rest between the defendant and the person whose money it is. Rule absolute.

4. PARKER v. TURNER. E. T. 1813. K. B. 2 Chit. Rep. 71. A sheriff having brought a deposit in lieu of bail into Court under the 43 Geo. 3. c. 46. the plaintiff obtained a rule to show cause why the same should not be paid to him, the defendant having omitted to put in and perfect bail; when it was contended that the statute being imperative upon the Court to give the plaintiff the deposit upon the defendant's non-appearance, the rule must be absolute. *Sed per Cur.* The statute does not divest the Court of its discretion as to giving time for putting in bail; and there must be an affidavit of merits before we shall grant this application.

5. CADBY v. PARSONS. T. T. 1814. C. P. 5 Taunt. 623. Defendant had been arrested by a wrong name. He paid the amount of the sum sworn to, and 10*l.* for the costs to the sheriff; at the same time protesting against the irregularity, and without prejudice. A rule nisi had been obtained. * Or, according to the 7 and 8 of Geo. 4, to comply with the requisitions of that act.

And if a defendant, being arrested by a wrong name, deposits the usual

ed by the plaintiff to have the money deposited paid to him.

Sed per Cur. It is impossible we can authorize the plaintiff to take this money out of Court, to which he makes no other title than by having arrested a person against whom no writ ever issued, and who, to free himself, pays this money without prejudice.

6. STEWART V. BRACEBRIDGE. T. T. 1819. K. B. 2-B. & A. 770; S. C. 1 Chit. Rep. 529.

Money had been deposited with the sheriff under the 43 Geo. 3. c. 46. in lieu of bail; plaintiff had been decreed to have this money, save and except a surplus which his attorney contended he had a right to retain in respect of certain poundage payable to the chief clerk in court on all moneys paid into court, according to the rule 5 Jac. 1. 1607.

Sed per Cur. This does not fall within the rule; for that rule only applies to cases wherein a party at his own request pays the money into court. However, that is not the case; for it is paid in under the provisions of an act of parliament, not by the party to the suit, but by the sheriff. Then if this fee does not fall within the rule of court, and the legislature have not expressly made any provision for its payment, it cannot be allowed by the Court.

7. CLARKE AND ANOTHER V. YEATES. E. T. 1822. C. P. 3 B. & A. 273.

This was a case in which the defendant had paid to the sheriff under the statute 43 Geo. 3. c. 46. s. 2. the debt, and the costs of arrest, in lieu of bail; and for which sum the sheriff gave a receipt. The sheriff not complying with a notice from the plaintiff to deliver over the money, he commenced proceedings against the defendant. But the Court held that the default of the sheriff should not work an injury to the defendant. Rule absolute.

8. When bail above is not put in and perfected in due time, or the defendant has not rendered himself, as it has been seen (*ante*, p. 28.) he may do, the plaintiff is entitled by the express words of the statute 43 G. 3. c. 46. s. 2. (*ante*, p. 27. n.) to have the money deposited and paid into court, paid to him by order of the Court upon motion made for that purpose;† see 5 Taunt. 623.

9. PEATE V. TRISCOTT. M. T. 1819. K. B. 1 Chit. Rep. 675.

The copy of a rule for taking out money deposited in the hands of the sheriff in lieu of bail had been left at the defendant's last place of abode, and another had been stuck up in the office. A rule was now moved for to show cause to why such service should not be deemed good, upon an affidavit, stating, that inquiry had been made at defendant's last place of abode, and it was found that he was gone to sea. The Court granted it, and afterwards made it absolute.

See 1 Taunt. 433. 5 id 777; 7 id 145.

(C) EFFECT OF IT, ON THE PROCEEDINGS IN THE CAUSE.‡

II. BAIL ABOVE §

* For this purpose make an affidavit stating the arrest; deposit payment of it into court, and that bail has been put in, or not perfected, as the case may be, and proceed as directed *ante*, p. 23; see 1 Archib. Pr. K. B. p. 84.

† The 10l. deposited as costs is to be subject to such deductions as, upon taxation of plaintiff's costs, as well of the writ as of his application to the Court in this behalf, may be found reasonable; see 45 G. 3. c. 46. s. 2. *ante*, p. 27. n.

‡ When the money has been deposited in court by the sheriff in lieu of bail, and paid out of court to the plaintiff, he may still enter a common appearance, or file common bail for the defendant if he think fit, and so proceed in his action; 43 G. 3. c. 46. s. 3. In these cases, there is no provision made by the act with regard to costs, if he should not eventually recover more than that sum; nor for his refunding any part of it, if he should recover less.

§ By statute 7 and 8 G. 4. c. 72. s. 2. it is enacted that, whereas by an act, passed in the forty-third year of the reign of his late Majesty King George the Third, *ante* p. 27. ns. persons arrested upon mesne process were enabled, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff the sum endorsed upon the writ, together with ten pounds in addition to such sum, to answer the costs, which might accrue up to the time of the return of the writ; and also such further sum, if any, as should have been paid for the King's fine, upon any original writ, and should thereupon be discharged from such arrest; and whereas it is expedient to extend the provisions of the said act, and to enable persons who have been arrested to deposit or pay into the court in which the writ shall be returnable, the sum in-

[30]

sum with out preja dice, plain tiff cannot take it out of court on defendant's committing to perfect bail.

And neither the sheriff, nor any officer of the court, is entitled to poundage, on the money being taken out of court.

And in no case will the defendant be prejudiced by the negligence of the sheriff.

But if bail be not perfected, or the defendant have not rendered himself, the deposit will be paid to the plaintiff.

[31]

And where defendant cannot be personally served with a rule for that purpose, leaving a copy of the rule at defendant's last place of abode, and sticking it up in the K. B. office has been deemed sufficient.

[32]

III. RETURN OF SHERIFF.*

Depositions. See *titls Bankrupt; Chancery; Coroner; Ecclesiastical Court; Evidence; Excise and Customs; Justice of the Peace; Witness.*

Deprivation. See *titl Ecclesiastical Persons.*

Deputy.† See *titls Churchwarden; Constable; Coroner; Corporation; Overseer; Principal and Agent; Sheriff.*

dorsed upon the writ, together with an additional sum as security for costs to abide the event of the suit, instead of putting in and perfecting bail in the said action; be it, therefore, enacted, that, in all cases in which any defendant shall have been discharged from arrest, upon making such deposit as is required by the said recited act, and the sum so deposited shall have been paid into court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the court, to allow the sum so deposited with the sheriff, and by him paid into court as aforesaid, together with the additional sum of ten pounds to be paid into court by such defendant, as a further security for the costs of the action, to remain in the court to abide the event of the suit; and, in all cases where any defendant shall have been arrested and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said court the sum indorsed upon the writ, together with the amount of the King's fine, if any, upon the original writ, and the further sum of twenty pounds, as a security for the costs of the action, there to remain to abide the event of the suit; and thereupon the said defendant may, and he is hereby required to, enter a common appearance, or file common bail in the action within such time, as he would have been required to have put in and perfected special bail in the action, according to the course of the said court, or default thereof, the plaintiff in the action is hereby empowered to enter such common appearance, or file common bail for the said defendant, and the cause may proceed, as if the defendant had put in and perfected special bail; and, in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the court upon motion made for that purpose, to receive the said money so remaining in, or so deposited or paid into the court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application; and if judgment be given in the said action for the defendant, or the plaintiff discontinue his suit or be otherwise barred, or in case the sum deposited and paid into court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into court, or so much thereof as shall remain, shall, by order of the court upon motion to be made for that purpose, be repaid to such defendant.

Provided always and be it enacted that it shall and may be lawful for the said defendant, who hath made his election, to make such deposit and payment as aforesaid at any time in the progress of the cause before issue joined in law or fact, or final or interlocutory judgment signed, to receive the same out of court, by order of the said court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said Court shall direct. Provided also and be it further enacted that it shall and may be lawful for any defendant, who shall have put in and perfected special bail in any cause, upon motion to the court in which the action is brought, if the Court shall so think fit, to deposit and pay into court the sum which would have been deposited and paid, in case the defendant had originally elected so to do, together with such further sum to answer the costs as the Court may direct, to abide the event of the said suit, and to be disposed of in manner aforesaid, and thereupon it shall be lawful for the said court to direct a common appearance to be entered, or common bail filed for the defendant, and an exoneretur to be entered upon the bail piece in the said cause.

* The return of the sheriff is, that the party has been discharged from the arrest, under the statute 43 Geo. 3. c. 46. s. 2. on depositing in the sheriff's hands the sum endorsed on the writ, with ten pounds in addition to answer costs, &c.

† A deputy is a person who exercises an office, &c. in another man's right, whose forfeiture or misdemeanor shall cause him, whose deputy he is, to lose his office. The common law takes notice of deputies, but it never recognises under-deputies; for a deputy is generally but a person authorised, who cannot authorise another; see 1 Lill. Abr. 446. A man cannot make a deputy in all cases, except the grant of the office justify him in it, and where it is to one to execute by deputy, &c. A deputy cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over; but he may empower another to do a particular act; see Lil. 379; 1 Salk. 96. A judge cannot act by deputy; see 2 Hawk. P. C. c. 1. s. 9. But it has been adjudged that recorders may hold their courts by deputy; see 1 Lev. 76. The office of Custos Brevium, and Chirographer in C. P. cannot be executed by deputy; see 1 Nels. Abr. 644. A steward of a court may appoint a deputy; and acts of an under steward's deputy have been held good in some cases; see Cro. Eliz. 534; et ante, vol. vi. p. 470. A bailiff of a liberty may appoint a deputy; see Cro. Jac. 240. Where an office descends to an infant, idiot, &c. such may make a deputy; see 9 Rep. 47. Where an office is granted to a man and his heirs, he may make an assignee of that office, and, by consequence, a deputy. A deputy of an officer has no interest therein but doth all things in his master's name, and his master shall be answerable; but an assignee

Descent.* See *titls. Curtesy; Dower; Ejectment; Heir.*

[33]

- I. GENERAL NATURE OF, p. 35.
- II. DISTINCTION BETWEEN DESCENT AND PURCHASE, p. 35.
- III. HOW IT DIFFERS FROM DESCENT BY THE CIVIL LAW, p. 36.
- IV. RELATIVE TO WHO MAY BE HEIRS.

- (A) ALIENS, p. 36.
- (B) BASTARDS, p. 37.
- (C) IDIOTS AND LUNATICS, p. 37.
- (D) MONSTERS, p. 37.
- (E) PAPISTS, p. 38.
- (F) PERSONS ATTAINED, p. 38.

V. RELATIVE TO THE DESCENT OF CORPOREAL HEREDITAMENTS.

(A) BY THE COMMON LAW.

1st. *Of its estates in possession.*

1. General remarks, p. 39. 2. Canons of descents.
 (a) Inheritances descend lineally to the issue of the person who last died actually seised, p. 40. (b) Male issue shall be admitted before the female, p. 42. (c) When males, eldest shall inherit; when females, they shall take jointly, p. 43. (d) Lineal descendants shall represent their ancestor in infinitum, p. 44. (e) On failure of lineal, collateral descent (to blood of first purchaser) shall take place subject to the three preceding rules, p. 45. (f) Proximity to collateral ancestor last seised must be by whole blood, p. 48. (g) In collateral inheritances male stock preferred to female, unless estate descended from female, p. 53.

3. Mode of tracing an heir at law, p. 53.

2dly. *Of estates in remainder or reversion,* p. 54.

(B) BY STATUTE LAW, p. 55.

(C) BY CUSTOM.

- 1st. Borough English, p. 57. 2d. Copyholds, p. 57. 3d. Gavelkind, p. 67.

VI. RELATIVE TO THE DESCENT OF INCORPOREAL HEREDITAMENTS.

- (A) ADVOWSON, p. 58.
- (B) COMMONS, p. 60.
- (C) DIGNITIES, p. 61.
- (D) FRANCHISES, p. 64.
- (E) OFFICES, p. 64.
- (F) RENTS, p. 65.

hath an interest in the office, and does all things in his own name, for whom his grantor shall not answer, unless in special cases. see *Termes. De Le Ley*. A superior officer must answer for his deputy in civil actions, if he is not sufficient; but in criminal cases it is otherwise, where deputies are to answer for themselves; see 2 *Inst.* 191; *Doct. and Stud.* c. 42.

* The doctrine of descents, or law of inheritance in fee-simple, is a point of the highest importance, and is indeed the principal object of the law of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a datum or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee as have sprung, or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs; this is a point that must be referred back to the standing law of descents in fee-simple to be informed of; 2 *Bl. Com.* 201; and see *Com. Dig. Descents*; *Bac. Abr. Descents*; 3 *Cruise's Dig.* 372. &c.; *Wood. Vin. Lec.* vol. ii. 250. &c.; *Hal. Hist. C. L.* c. 11; *Wright's Ten.* 174; *Gilb. Ten.* 2; *Dalrymp. Feud. Prop.* 4 edit. c. 5. p. 159; *Bl. L. of Desc.*; *Watk. on Desc.*; *H. Chitty on Desc.*; *Rowe on Desc.*; and *Robinson on Gavelkind*, p. 20.

[34]

(G) TITHES, p. 65.

(H) WAYS, p. 66.

VII. RELATIVE TO DESCENT IN SOME SPECIAL CASES.

(A) OF THE CROWN, p. 66.

(B) OF HEIR LOOMS, p. 67.

VIII. RELATIVE TO HOW A DESCENT MAY BE QUALIFIED OR DESTROYED.

(A) BY ACT OF THE ANCESTOR.

1st. By a devise, p. 68. 2d By a feoffment and re-enfeoffment, 74.

3d. By fine or recovery, p. 75.

[35]

(B) BY OPERATION OF LAW, p. 75.

(C) IN CONSEQUENCE OF THE ACTS OF THIRD PARTIES, p. 76.

I GENERAL NATURE OF.

Descent is the title whereby an heir succeeds to his ancestor: Descent or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate by right of representation as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor,* and an estate so descending to the heir is in law called the inheritance; see 2 Bl. Com. 201; 3 Com. Dig. 362.

2. ROE, D. AISTROP, v. AISTROP. M. T. 1778. C. P. 2 Bl. Rep. 1228.

And is so inviolable, that it can not be altered or varied.† Freehold lands were settled before marriage on the husband and wife for life, remainder to the heirs of the husband and wife. Copyholds in borough English were also settled on the husband and wife for life, remainder to the heirs of their two bodies *in like manner*, and to the same uses as the freehold. This was an action of ejectment brought to recover the copyhold lands so held as above stated. A verdict had been given to plaintiff subject to the opinion of the Court. *Per Cur.* There is reason, indeed, to suppose that the parties might not mean the two estates to go in a different channel. But this is only a supposition, and, if certain, still, as this is a legal estate, it is not in the power of the parties to alter the legal course of descent. *In like manner* only means, that both estates shall be entailed. See 8 Co. 1; Co. Litt. 27. a.; Plowl. 251; 7 Co. 40. b.; 1 Brownl. 45; 2 id. 334.

II. DISTINCTION BETWEEN DESCENT AND PURCHASE.‡

[36] The difference between the acquisition of an estate by descent and by purchase, consists principally in two points; 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2dly. That an estate by purchase will not make the person who acquires it answerable for the acts of his ancestors as an estate by descent will;§ see 3 Cru. Dig. 452.

* Yet though the lands are cast on the heir by the law itself, the heir has not plenum dominium, or full and complete ownership, till he has made an actual corporeal entry into the lands; for if he die before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seised. It is not, therefore, only a mere right to enter, but the actual entry that makes a man complete owner, so as to transmit the inheritance to his heirs; non jus sed seisinam facit stipitem; Com. Dig. Descent, C. 8, 9, 10.

† For, although the right of inheriting be known to the laws of every civilized country, and is founded on the best principles of reason, yet it is not derived from natural law, or which can belong to any man in a state of nature; from which it follows, that the numerous and arbitrary rules by which its course is either directed or interrupted can never properly be esteemed or objected to as violations of natural justice; 3 Cru. Dig. 362.

‡ The acquisition of an estate by purchase is, in legal signification, where title thereto is vested in a man by his own act and agreement, by some kind of conveyance either for money or for some other consideration, or freely of gift. Sir W. Blackstone has enumerated the following modes of acquiring an estate by purchase:—exchange; occupancy; prescription; forfeiture; and alienation.

§ The instances in which a person takes by descent, and not by purchase, may be classed under the following heads: 1st, Where an estate descends in a regular course of succession from father to son, or from any other ancestor to his heir at law; see 1 Co. 98. a. b.; Watk. Descent, 28; 2ndly, Where the ancestor by any gift or conveyance takes an estate of freehold, and in the same conveyance an estate is limited either immediately or immediately to his heirs in fee or in tail; see Shelley's case, 1 Co. 104; Watk. Descent, 233; 4 Cru. Dig. 377; Preston's Estates, 263. 221; 11 Rep. 80; 5 Burr. 2615; S. C. 2 Bl. Rep. 687; 1

III. HOW IT DIFFERS FROM DESCENT BY THE CIVIL LAW.

By the civil law, the heir is defined to be, he who is universal successor to all the goods, and all the rights, of the deceased, and who is bound to acquit all the charges and burdens of the said goods; 1 Domat b 1. t. l. s. l p 558. And this definition embraced the two sorts of heirs known to that law, viz. those who were instituted or named by a testament, called testamentary heirs, and those to whom the law gave the inheritance on account of their proximity in blood, who were called heirs to intestates, because they succeeded, if they were not excluded by a testament, *ibid*. But the law of England makes a distinction between these two sorts of heirs, and gives them different names. For the heir, the legal understanding of the common law, is he to whom land tenements, or hereditaments, by the act of God, and right of blood, do descend of some estate of inheritance. And by the common law a man cannot be heir to goods or chattles; for, as to these, the person who succeeds to them, is called in law, executor, if he succeeds by the appointment of the deceased in his last will and testament; or administrator, if he succeeds by the appointment of the ordinary in the case of dying intestate; see Co. Litt. by Thomas, vol. ii. p. 156.

IV. RELATIVE TO WHO MAY BE HEIRS.

(A) ALIENS.

1. It has been seen, *ante*, vol. i. p. 465, that none are capable of inheriting lands, unless they are natural born subjects, or naturalized, or made denizens. And it may be laid down as a general rule, that foreigners are not allowed to possess any lands within this realm by any title.*

An alien cannot inherit
[37]

2. Doe, D. DUROURSE, V. JONES. T. T. 1791. K. B. 4 T. R. 300.

A. B. a natural-born subject quitted the kingdom, and married C. D. an alien, by whom he had a son, born abroad. The question was, whether this son was capable of inheriting lands in England, as heir to his mother. Lord Kenyon said, that supposing there existed any doubts respecting the meaning of the statute 25 Ed. 3. yet the subsequent statutes operated as a parliamentary exposition of it; particularly the statute 4 G. 2. c. 21. which had closed the question, by enacting that all children born out of the allegiance of the crown, whose fathers were natural-born subjects, should be natural-born subjects; and also the statute 13 G. 2. c. 21. which extended the same privilege to grandchildren, but still confined them to the paternal line; from which it clearly followed, that a person born in foreign parts, and of a foreign father, did not derive inheritable blood in this kingdom from his mother.

And it has been held that a person born abroad, whose father was a foreigner, cannot inherit through his mother, though the latter be a natural-born subject.

(B) BASTARDS. *Vide ante*, vol. iv. p. 223.

So a bastard cannot inherit.

(C) IDIOTS AND LUNATICS.

Idiotcy and lunacy are no impediments to the heritable blood of the person. Vent. 372; 2 Bl. Rep. 698; 2 T. R. 444; 1 Ld. Raym. 326. 3rdly, Where an ancestor devises his estate to his heir at law; 1 Str. 437; Watk. Cop. 125. 4thly, Where an ancestor by deed, or by his will, limits a particular estate to a stranger, or either limits over the remainder (or rather a reversion) to his right heirs, or leaves the same undisposed of; see Watk. Descent, 271; and Mr. H. Chitty's Treatise on Descents, p. 4.

But idiots

* Formerly, also, a natural-born subject could not make title by descent, through a person who was an alien. But the statute 11 & 12 Will. 3. c. 6. enables all natural born subjects to inherit, and make their pedigree by descent from any ancestor, lineal or collateral, although the father, or mother, or other ancestor of such person, by, through, or under whom they derive their pedigree, was an alien, in the same manner as if such ancestor was naturalized, or natural-born. Even before this statute, the issue of an heiress by an alien might, if born in this country, have inherited to his mother, though not to his father; 1 Sid. 201; 1 Vent. 422. By the statute 25 G. 2. c. 39. a natural-born subject, who derives his pedigree through an alien ancestor, shall not inherit by virtue of the statute 11 & 12 W. 3. unless he was in being, and capable of taking at the death of the person last seized, to whom he claims as heir. But this act is declared not to operate to bar the claims of a posthumous nearer heir; and, therefore, if the descent were cast on a daughter, and a son was born afterwards, she would be divested in his favour; and, if more daughters were born after, they should take in coparcenary with her on whom the descent was cast, according to the usual rule of descents; see H. Chitty's Desc. 37.

and lunatics may. sons subject to such aberrations of the mind; Co. Litt. 2. 8; and Collinson on Lunacy.

(D) MONSTERS.

So monsters cannot take by descent;

A monster which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir or inherit any lands, albeit it be brought forth in marriage; but although he hath deformity in any part of his body, yet if he hath human shape, he may be heir; 2 Bl. Com. 246, 247; Co. Litt. 7. b.; 29. b.

(E) PAPISTS.

Or Papists; Papists and persons professing the Popish religion, are by statute 11 & 12 W. 3. c. 4.* disabled to purchase any lands, rents, or hereditaments, and all estates made to their use or in trust for them are void; see 2 Bl. Com. 293; 5 Bac. Ab. 273; 1 P. Wms. 354. But this incapacity is merely personal, and does not destroy the inheritable quality of his blood, so as to impede the descent to other of his kindred; see 2 Bl. Com. 257.

[38]

(F) PERSONS ATTAINED.

Nor persons attained;

persons attainted of high treason or felony, are incapable of inheriting lands or of transmitting them by descent to their children; and see 1 Vent. 8. a.; 391. b.; Noy. 165.

And in the last case put, such disability will even create a corruption of blood.†

2. COLLINGWOOD v. PAGE. In the Exchequer Chamber. 1 Vent. 413.

A. and B. were brothers; A. was attainted, and had issue C. and died; C. purchased lands and died without issue. Held that B. ‡ his uncle, could not inherit from him, because he must derive his descent through A. who was the preceding ancestor and incapable; see Dyer, 274; Cro. Car. 543.

* By this act it is enacted, "that every Papist who shall not abjure the errors of his religion, by taking the oaths to the Government, and making the declaration against substantiation, within six months after he has attained the age of 18 years, shall be incapable of inheriting, or taking, by descent, as well as purchase, any real estates whatsoever; and his next of kin, being a Protestant, shall hold them to his own use till such time as he complies with the terms of the act." This act is repealed by statute 18 Geo. 3. c. 60. as to Papists who, within six months after the passing of the act, or their coming of age, should take the oaths prescribed by this last act.

† This doctrine is thus explained by the Hon. Chas. Yorke (Law of Forfeiture, 4 edit. 22. id. 65): It is a principle in all states, where a man is neither a subject by birth, or express compact, or has voluntarily renounced the mutual obligations, to consider him as not within their obedience, or even notice; but, when he has forfeited his civil rights by crime, he is regarded as still subject to their power, and in every respect within the strict consideration of the law: that the ancient common law of England clearly proceeds upon this principle. Where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being unknown to the law, he is excluded from inheriting, and the next of kin within the allegiance, who did not claim under him, was admitted; or where he had incurred civil disabilities, by his own voluntary act, not criminal, he was taken to have undergone civil death, and the next in descent entered. But where he is attainted of treason, or felony, the law will not pass him over; and marks him out in *rei exemplum et infamiam*. Hence it is that though he was never in possession, nor those that claim under him more capable of inheriting than he, by reason of the consequential disability arising from the attainder of the ancestor; yet the estate will be interrupted in its course to the collateral; and excheat.

‡ On the same principle it was in Dyer, 4. a. decided that, if a man has two sons, and the eldest is attainted, and afterwards the father dies seized of an estate in fee simple, the younger brother cannot inherit from the father; for the elder brother, though attainted, is still a brother, and no other can be heir to the father while he is alive. This was considered as such a hardship that, in 1 H. 4. Rot. Parl. vol. iii. 440. a petition was preferred by the Commons to the King, praying that, where the eldest son, during the life of the father, was attainted, the next brother might, notwithstanding, succeed as heir to his father; to which the King answered, "Let the common law run." It is, however, a general rule, that the attainder of a person who need not be mentioned in the derivation of the descent, does not impede, let the ancestor be ever so remote; therefore, where a person may claim as heir to an ancestor, without being obliged to derive his descent through an attainted person, he will not be affected by his attainder. Thus, in the case of the attainder of an elder son; if such elder son dies in the life-time of his father, without issue, the younger son will then inherit from the father, because he can derive his descent from him, without claiming through, or mentioning his elder brother; Hob. 384; Cro. Car. 35. So, if an alien has two sons born in England, the one may inherit from the other, though none of

V. RELATIVE TO THE DESCENT OF CORPOREAL HEREDITAMENTS.* [39]

(A) BY THE COMMON LAW.

1s. Of estates in possession.

1. General remarks.

As the doctrine of descent depends on the nature of kindred, and several degrees of consanguinity, a true notion should be obtained of this kindred or alliance in blood. Consanguinity or kindred is defined to be the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral; lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between father, grand-father, and great grand-father. Collateral consanguinity is that which subsists between persons lineally descended from the same ancestor, who is the *stirps* or root; the *stipes*, trunk, or common stock, but who do not descend the one from the other; as brothers, and the children, grand-children, &c. of brothers; see 2 Bl. Com. 302. 206. The method of computing these degrees in the canon law, which our law has adopted is as follows:—we begin at the common ancestor and reckon downwards, and in whatever degree the two persons, or most remote of them is distant from the common ancestor, that is the degree in which they are said to be related to each other;† see 2 Bl. Com. 203.

2. Canons of descent.‡

(a) Inheritances descend lineally to the issue of the person who last died actually seised.§

1. In consequence of this canon, whenever a person dies seised in fee simple of a real estate, as pointed out in note, p. 35 having issue, it immediately Inheritance
descends lineally them can inherit to their father; for the descent between them is immediate, and one shall make a title in a writ of *mort d'ancestor* as heir to his brother, without mention of the father; 1 Vent. 413; 3 Cru. Dig. 369.

Sir W. Blackstone, vol. ii. 256. observes, that, corruption of blood being looked upon as a peculiar hardship, therefore, in most if not all, the new felonies created by parliament since the reign of Henry VIII. it is declared that they shall not extend to any corruption of blood. By a statute passed in 7 Anne it was enacted, that corruption of blood should cease upon the death of the two grandsons of Jac. II. It has, however, been revived by a modern statute 39 Geo. 3 c. 1. But by a subsequent one, 54 Geo. 3 c. 145. *ante*, vol. ii. p. 494. n. it is confined to high treason, petit treason, and murder, and to the crime of abetting, procuring, or counselling the same.

As to the effect on the descent of estates tail, *vide post*, p. 55. 61.

* Not only every thing which falls under the denomination of real estate descends to the heir, but also heir looms, and all such other chattels as are annexed to, or connected with, the freehold, as wainscots, benches, doors, windows, and the like. Every species of tree, whether timber or not, standing on the land at the death of the ancestor, together with the grass actually growing, though ripe for cutting, descend to the heir. But corn and every other vegetable produced annually by labour and cultivation, go to the executor or administrator of the ancestor, as a compensation for the expense of raising them; 3 Cru. Dig. 363.

† Here it may be remarked that the civilians take the sum of the degrees in both lines to the common ancestor. This is of importance to know, in ascertaining who are entitled to the administration and to the distributive shares of intestate personal property.

‡ All personal hereditary successions, says Sir-Matthew Hale, may be distinguished into three kinds, viz. 1st, in the *descending* line, as from father to son or daughter, nephew or niece; that is, grandson or grand-daughter; 2dly. in the *collateral* line, as from brother to brother or sister; and so to brother and sister's children; 3dly. in an *ascending* line, either direct, as from son to father, or grandfather (which is not admitted by the law of England); or in the transversal line, as to the uncle or aunt, great uncle, or great aunt, &c. And, because this line is again divided into the line of the father, or the line of the mother, this transverse ascending succession is either in the line of the father, grandfather, &c. *on the blood of the father*, or in the line of the mother, grandmother, &c. *on the blood of the mother*. The former are called *agnati*, the latter *cognati*; 2 Hale H. C. L. c. 11. p. 113, 114.

§ To explain the more clearly both this and the subsequent rules, it must first be observed that by law, no inheritance can vest, nor can any person be the actual complete heir of another till the ancestor be previously dead. *Nemo est hæres viventis*; before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they

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the heir of
the person
last seized.*

descends to such issue on which the freehold in law is cast before entry; 3 Cru. Dig. 375.

§ But, although lands shall always descend to the person who is heir at the time of the death of the ancestor, consistently with the rule that the freehold shall never, if possible, be in abeyance, such descent may be defeated by the birth of a nearer heir. Thus, where a person dies, leaving his wife *en ciente*, the com. on law, not considering the infant *en ventre sa mere* as in existence, casts the freehold on the person who is then heir; but, when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him; 1 Inst. 11. b.; 3 Cru. Dig. 375. Such heir is not however, entitled to any profits that accrued before his birth, because the entry of the heir was congeable till the posthumous child was born; 3 Will. 516.

outlive the ancestor; as the eldest son, or his issue, who must, by the course of the common law, be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son; nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter, in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally divested by the birth of a posthumous son; Bro. tit. Descent, 58; 2 Bl. Com. 208.

It is also another rule of the common law respecting descents, that no person can properly be such an ancestor as that an inheritance can be derived from him, unless he had an actual seisin; Co. Litt. 15. For the law requires this notoriety of *possession*, as evidence that the ancestor had the property in himself which is to be transmitted to his heir. The seisin, therefore, of any person makes him the root or stock, from which all future inheritance by right of blood must be derived.

The nature of the seisin which a person acquires, and which will render such person an ancestor, to whom the next claimant must make himself heir, depends materially on the question of whether the estate was obtained by purchase, or by descent. Where any person acquires hereditaments by purchase, and such hereditaments are of a corporeal nature, he generally at the same time also acquires, or receives, the corporeal seisin or possession, Watk. Desc. 3. Where the deed of purchase, or instrument by which such hereditaments are conveyed to the ancestor, is founded upon feudal principles, it is a ways attended with actual livery of seisin, which is exactly similar to the investiture of the feudal law; and, without which such instrument was in no instance sufficient to transfer an estate of freehold; Co. Litt. 49. a. Where the instrument derives its essence from the statute of uses (27 H. 8: c. 10.) the *cestui que use* is clothed with the actual possession of the lands by the operation of the act. And in case of a devise by will of lands to a man in fee, and who dies after the deviser, the freehold, or interest in law, is in the devisee before entry; and, on his death, his heir may and will take by descent; Co. Lit. 111. a.; 1 Show. 71. As to incorporeal hereditaments, and as to reversions and remainders, of which when expectant on an estate of freehold, there can be no corporeal seisin, the property, whether vested in possession, or only in interest, or merely contingent, is fixed or settled in the purchaser; at the time of the purchase, so as to render them transmissible to his heir; Watk. Desc. 9. 10. Whether, however, the hereditaments be of a corporeal or incorporeal nature, or in possession or expectancy, the purchaser, on the purchase being completed, and the property in them being transferred, becomes immediately the root or stock of descent, and the hereditaments become descendable to his heirs; Watk. Desc. 4. In the instance, therefore, of a purchase, the question is, whether such property was legally vested, or fixed in the purchaser, so as that, had he lived, he might have had the actual possession or enjoyment of it; and he may, in many instances, transmit it to his heirs, though he never had an actual seisin of it himself; and even where he never had any kind of seisin whatever; for it is a rule, that where the heir takes any thing which might have vested in the ancestor, the heir shall be in by descent; 1 Co. 98. a.; Moore, 140. Thus, in the case of a fine levied, or recovery suffered, though the party die before execution, yet the execution afterwards shall have relation to the act of the ancestor, and the heir be in by descent; Shelley's case, 1 Co. 93. b. 106. b.; Co. Litt. 361. b.; 7 Co. 38. a.; Borr. 2786. The execution of the writ consists in the delivery of seisin by the sheriff to the demandant; but it is now only returned, and never in fact executed; 5 T. R. 179. 180. And in the instance of an exchange, if both parties to the exchange die before either enters, the exchange is altogether void; but if either of the parties enters, and the other dies before entry, his heir may enter, and be in by descent; 1 Co. 98. a.

But where a person takes an estate by descent, he thereby acquires only a seisin in law of the estate descending, unless the estate were, on the death of the ancestor, held by any person under a lease for years (though otherwise, if leased for an estate of freehold); for then the heir had not merely a seisin in law, but by the possession of such lessee for years, acquires a seisin or possession in deed; Co. Lit. 15. a.; 3 Atk. 469; Moore, 126; Case,

2. It is a strict rule of the law of descents, that the father, mother, or other lineal ancestor, shall not, as such, be the immediate heir to the purchaser, their son, or other lineal descendant;† Litt. s. 3; 2 P. Wms. 734.

(b) *Male issue shall be admitted before the female.*‡

* The total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring is peculiar to our own laws, and, as such, has been deduced from the same original; for, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother; and by the law of Rome, in the first place, the children or lineal descendants were preferred, and on failure of these, the father and mother, or lineal descendants, succeeded, together with the brethren and sisters, though by the law of the 12 tables, the mother was originally, on account of her sex, excluded; see 2 Bl. Com. 210. Hence this rule of our laws has been censured as absurd, and derogating from the maxims of equity and natural justice; Craig. de Jur. Feud. 1. 2. t. 13. s. 15; Locke on Gov. Part. s. 90. Mr. Justice Blackstone has however shown, that there is nothing unjust or absurd in it; but that, on the contrary, it is founded on very good legal reason. "We are to reflect," says he, "in the first place, that all rules of succession to the estates are creatures of civil polity, and *juris positivi* merely. The right of property which is gained by occupancy extends naturally no further than the life of the present possessor; after which the land, by the law of nature, would again become common, and liable to be seized by the next occupant; but society, to prevent the mischief that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions, whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law. If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures; for it was an express rule of the feudal law (2 Feud. 50.) that *successionis feudi talis est natura quod ascendentes non succedunt*; and, therefore, the same maxim obtains also in the French law to this day (Domat. p. 2. L. 2. t. 2; Monteag. Esp. L. 1. S. 1. c. 33.) Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line (1 L. Hen. 1. c. 70); but this soon fell again into disuse; for, so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law, (1. 7. c. 1.) that *hereditas nunquam ascendit*, which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal original, and, taken in that light, there are some arguments in its favour, besides those which are drawn merely from the reason of the thing;" 2 Bl. Com. 211.

† That is, the father shall not take the estate, as heir to his son, in that capacity; yet, as father or mother may be cousin to his or her child, he or she may inherit to him as such, notwithstanding the relation of parent; Gastwood v. Ninke, 2 P. Wms. 613. So, if a son purchase lands and dies without issue, his uncle shall have the land as heir, and not the father, though the father is nearer of blood; Litt. s. 3; but if in this case the uncle acquires actual seisin, and dies without issue while the father is alive, the latter may then, by this circuit, have the land as heir to the uncle, though not as heir to the son; for he cometh to the land by collateral descent, and not by lineal ascent; Craig de Jur. Feud. 234; Wright's Ten. 182. n. (Z.) So, under a limitation to "the next of blood of A.," the father would, on the death of the son without issue, take, in exclusion both of the brothers and uncle of A., who would have first succeeded under the usual course of descent as heirs of A.; for a father is nearer in proximity of blood than a brother or an uncle; Litt. s. 8. Co. L. 10. b. 11. a; 8 Rep. 40. b; 1 Ven. 414; Hale, C. L. 323; and this is the reason why the father is preferred, in the administration of the goods of the son, before any other relation, except his wife and children, H. Chit. Desc. 68.

‡ This preference of males to females is entirely agreeable to the law of succession among 272; Watk. 65. n. g. This seisin in law alone is not sufficient to make him an ancestor; but in order to make himself the stock, or root, of descent, the fourth from which the hereditary blood of future claimants must be derived, and so enable him to turn the descent and render the hereditary possessions descendible to his own heirs, it is requisite that such heir, who thus succeeds to the estate by descent, should gain an actual seisin, or possession; or, what is equivalent thereto, according to the nature and quality of the estate descending; Watk. Desc. 36, 37, 57; Ratcliffe's case, 3 Co. 37. This actual seisin may be acquired by entry into the lands descended, if of an estate in possession, which is the usual and direct mode of acquiring it; which may be made by the heir himself, or by his guardian (if he is under age), or by his attorney, or even a stranger entering on his behalf. So also the heir may acquire an actual seisin, by granting a lease for years, or at will, and the entry such his lessee under the lease, and the seisin in law cast upon him by the law, will be sufficient to enable him to grant such lease; Plowd. 87 137. 142; 6 Com. Dig. Seisin (A. 2); Bac. Ab. Lease, L. 5; 2 Stra. 1086; H. Chit. Desc. c. 4. s. 3. p. 48. 62.

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Males are preferred to females in descent.

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The third canon comprises primogeniture or descent to the eldest son.

Thus sons are admitted before daughters; but daughters succeed before collateral relations, and in all cases of descent, females are preferred to more remote males; our law steering a middle course between the absolute rejection of females, and the putting them on a footing with males; 3 Cr. Dig. 377.

(c) *When males, eldest shall inherit* : when females, they shall take jointly.*

1. When any person dies seised, leaving several sons and daughters, the inheritance goes to the eldest son of such person solely, and exclusively of all the brothers and sisters of such eldest son;† Rol. Rep. 36; Co. Litt. 24. a.

the Jews, and among the states of Greece, or at least among the Athenians, but was totally unknown to the laws of Rome; see 2 Bl. Com. 213. With us, the true reason for preferring the males must be deduced from feudal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females; it only postpones them to males; *vide supra*.

It has been a matter of considerable speculative disquisition, whether the existence of the law of primogeniture, independent of its injustice, does not retard the progress of national improvement. It has been on the one hand, maintained that the productive nature of the soil is diminished, as it is contrary to reason to suppose it compatible with the exertions of a few favoured individuals to render a country, under such circumstances, as productive as it would be, were it portioned out amongst a larger class of persons; and that, consequently, if the prosperity of a people, is to be estimated by the amount of their property, and their advancement, by the increased production from that property, the system was erroneous. Again, as far as regards the morals of a people, it is urged that this arrangement of property engenders the baneful vices of luxury and dissipation on the one hand, and the discontent and delinquency, which are the offspring of poverty, on the other; see 2 Bl. Com., edited by Mr. Chitty, p. 214. n., and Dawson on the Causes of the Poverty of Nations. Let this question, however, be referred to the arbitrament of experience, and the law of primogeniture, in the restricted operation to which it has been reduced, since the abrogation of the feudal system, will remain. If this law were so absolute and imperative that none could escape from its control, the arguments above stated would have tenfold weight: but the fact is, that in nearly all the cases to which those arguments refer, it is by the exercise of the right of disposing of property as he who has acquired it pleases, and not by the law of primogeniture, that such large portions vest from generation to generation in single individuals. And till the legislature enacts that no man shall bestow the fruits of his industry and good fortune on whom, and with what limitations, he chooses, so much of the system complained of must continue. It would not be difficult to show that the evils which would flow in result, from such a breach in the present barrier of private property, would be most pernicious to the well-being of the state. The law of primogeniture operates only upon intestate estates, a very small portion of the whole wealth which is enjoyed from one generation to another; and without acceding to the correctness of the reasoning above cited, it may be admitted, that if this law were ameliorated, so as to entitle the eldest born, to such superior portion, as in the average, would be given to him, had the distribution been directed by the intestate, it would be an improvement; or the rule which governed a departed lawyer and statesman (Sir Samuel Romilly) not less distinguished by his domestic virtues, than he was eminent for his public station, might well be adopted, if any change were contemplated. Having seven children, he divided his possessions into eight parts, and giving two of those parts to his eldest son, left one to each of the rest of his children; see Considerations on the Law of Forfeiture, &c. by the Hon. C. Yorke; 2 Wood's V. S. 252.

† This right of primogeniture in males seems anciently to have obtained among the Jews; see Selden de Succ. Ebr. c. 5; Dalrymple p. 67. 169. 4th edit; 2 Bla. Com. 214, 215. This rule is clearly of feudal origin. When honorary feuds or titles of nobility began to be created abroad, it was found necessary, in order to preserve their dignity, to make them impartible; 2 Feud. 55; or, as they styled them, *feuda individua*, and in consequence descendible to the eldest son alone: Hale H. C. L. 221. These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror. As late, however, as the reign of Henry the Second, we find that knights' fees, on estates held by military services, should descend to the eldest son, and socage fees should be partible among the male children; Glanvil, l. 7. c. 3; Mirror, c. 1. s. 3; 2 Bla. C. 215; Wright's Ten. 176, 177. This distinction, however, seems to have ceased about the time of Henry III.; or according to Dalrymple, p. 166. in the reign of Henry II. and socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture; 3 Cra. 354. And at this day, with the exception of estates pursuing a course of customary descent, all lands in this country devolve universally on the eldest son only, exclusive of all the other children.

[44]

2. As to females all being equally incapable of performing any military service, there could be no reason for preferring the eldest; and therefore Litt. s. 241. states, the law to be; that where a man or woman seised of lands in fee hath issue but daughters, they shall all equally inherit, and make but one heir, and are called parceners by descent; *vide post*, tit. Parceners.

(d) *Lineal descendants shall represent their ancestors in infinitum.*†

This rule of descent is, "that the lineal descendants in *infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living;" Hale's, H. C. L. c. 11. This right transferred by representation, is infinite and unlimited, in the degree of those that descend from the represented; for the son, the grandson, the great grandson, and so all downwards in *infinitum*, enjoy the same privilege of representation as those, from whom they derive their pedigree had, whether it be in descent lineal or transversal; Hale, C. L. c. 11. And from hence it follows, that the nearest relation is not always the heir at law; as the next cousin, *jure propinquitatis*; 1 Inst. 10. b. Proximity of blood, therefore, is two fold, either positive or representative. It is positive, when the parties claim in their individual right, as between the second and third son or between the uncle and grand-uncle; it is representative, when either of the parties claim as being lineally descended from another, in which case he is entitled to the degree of proximity of his ancestor. Thus, the grand-son of the elder son of any person proposed is entitled, before the second son of any such person, though in common acceptance nearer by two degrees; and this principle of representative proximity is by the law of England so peremptory, that a female may avail herself thereof, to the total exclusion of a male claiming in his own right; for in descents in fee-simple, the daughter of the eldest son shall, as claiming by representation of her father, succeed in preference to the second, or youngest son: see 3 Cru. Dig. 378, 379; H. Chitty's Desc. p. 84.

(e) *On failure of lineal, collateral descent (to the blood of first purchaser) shall take place, subject to the three preceding rules.*‡

1. The fifth rule of descent is, "that no failure of lineal descendants, or is-

* However, the succession by primogeniture even among females takes place as to the inheritance of the crown; *vide post*, p. 66. And the right of sole succession, though not of primogeniture, was also established as to female dignities and titles of honour; *vide post*, p. 61.

† This mode of representation is a necessary consequence of the double preference given by our law; first, to the male issue; and next, to the first born among the males; see 2 Bl. Com. 218; yet this representation does not appear to have been established in the time of Henry II. nor until that of Henry III; *ibid*. 219.

‡ This is, says Mr. W. Blackstone, the great principle upon which the law of collateral inheritance depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the year books; M. 12 Edw. 4. 14; Fitzherbert, Abr. t. Descent, 2; Brook, Abr. t. Descent, 38; Hale, H. C. L. 243; "that he who would have been heir to the father of the deceased, (and, of course to the mother, or any other real or supposed ancestor,) shall also be heir to the son; a maxim that will hold universally, except in the case of a brother or sister of the half blood; 2 B. Com. 223.

This is a rule almost peculiar to our own laws, and those of a similar original. It is to be found in the Grand Coutume of Normandy, c. 25. from whence it was introduced here, and is plainly derived from the feudal law. For when fiefs first became hereditary, no person could succeed to a *feudum novum*, but the lineal descendants of the first acquirer, who was called the perquisitor. So that if a person died seised of a fief of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. If it was *feudum antiquum*, that is, if it had descended to the proprietor from any of his ancestors, then his brothers, and such other collateral relations as were descended from the person who first acquired it, might succeed.

However, in process of time when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum*, to hold *ut feudum antiquum*, that is, with all the qualities, annexed, of a fief derived from his ancestors, and then the collateral relations were admitted to succeed even in *infinitum*, because they might have been of the blood of the first imaginary purchaser. Of this nature are all the grants of fee-simple estates of this kingdom:

Females shall all take together.*

Canon fourth declares, that lineal descendants shall represent their ancestors in *infinitum*. [45]

On failure of lineal, collateral descent shall be to blood of first purchaser i. e. in fiction of law, first purchaser; *vide note, infra*.

successor of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser,* *subject to the three preceding rules.*†

But where an estate has really descended in a course of inheritance to the person last seised, none are admitted but those through whom the inheritance hath passed.

It follows, that where lands descend to a person *ex parte paterna* [47]

terna, none *ex parte materna* can inherit. *et vice versa.* But where a person seised *ex parte materna* acquires the character by means of some conveyance of the estate of a new purchaser, the estate will become descendible to his heirs general. § No conveyance, however of a particular estate will alter the

2. If the father had purchased lands, and it had descended to the son, and the son had died without issue, and without any heir on the part of the father, it should never have descended in the line of the mother, but escheated; for though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. Hale. 325; 1 Inst. 13. a. But if there had been none of the blood of the grandfather, yet it might have been restored to the line of the grandmother, because her *consanguinei* were as well of the blood of the father, as the mother's consanguinity is of the blood of the son. Consequently, also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered and died without issue, his father's brothers or sisters, or their descendants, or, for want of them, his great-grandfather's brothers or sisters, or their descendants; or, for want of them, any of the consanguinity of the great-grandfather, or brothers, or sisters, of the great-grandmother, or their descendants, might have inherited. For the consanguinity of the great-grandmother was the consanguinity of the grandfather. But none of the line of the mother, or grandmother, (that is, the grandfather's wife,) should have inherited, for that they were not of the blood of the first purchaser. And the same rule holds, *e converso*, in the case of purchases, in the line of the mother, or grandmother. They shall always keep in the same line in which they were settled on the first purchaser; Hale, 326; Chitty's Desc. 96.

3. GODBOL V. FREESTONE. M. T. 1693. K. B. 3 Lev. 406.

A person seised of lands by descent, *ex parte materna*, made a feoffment of them to uses; as to Black Acre, to the use of himself for life; remainder to his wife for life remainder; to the heirs of his body on his wife begotten, remainder to his own right heirs; and as to White Acre, to the use of himself for ninety-nine years, if he should so long live, remainder to his wife for life, the remainder to his first and other sons in tail male, remainder to himself and his heirs. The Court decided that, upon the death of the husband without issue, the remainder descended to the heirs of the feoffor, *ex parte materna*; because the ancient fee remained in him.

for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*, unless in the case of a fee-tail, and there this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is, with us, a *feudum novum*, to hold *ut antiquum*, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance; 2 Bl. Com. 222. 223; 3 Cru. Dig. 380.

* It should be here noticed that, though it is necessary that a person who would succeed must show himself to be of the blood of the first purchaser; yet, where the persons who inherit succeed or derive title to the inheritance by virtue of remote and intermediate descents from the purchaser, it will be sufficient if they are related by half blood only to the purchaser, or to such other and intermediate ancestors who were formerly and intermediately seised of the inheritance in the regular course of descent from the purchaser; provided, according to the rule which follows, they are the worthiest legal relatives of the whole blood to the person last seised; Rob. Inh. 45.

† Viz. 1st. Preference of males to females in equal degree, *ante*, p. 42; 2dly, Primogeniture among males, and coparceny among females, *ante*, p. 43. and 3dly, The right of representation, *ante*, p. 44.

‡ But it must be observed, that inheritance of this kind cannot be created by any act of the parties; for if a person gives lands to another, to hold to him and his heirs on the part of his mother, yet his heirs on the part of his father shall inherit. For no person can create a new kind of inheritance not allowed by the law, therefore the words "on the part of the mother" are void; see 3 Cru. Dig. 382.

§ For instance, if a person be seised of lands as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and his heirs, this is a new purchase; and if he dies without issue, the heirs of the part of the father shall inherit; 1 Inst. 12. b. So if a person seised of lands *ex parte materna*, because the feoffment in fee was a total disposition of the estate, and the rent was acquired by purchase: *id.*; see Prec. in Ch. 219; 1 Atk. 480.

4. GOODRIGHT, D. ALSTON, v. WELLS. T. T. 1781. K. B. Doug. 771.

A. B. agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made, having by his will devised all his real and personal estate to his wife, in trust to educate and maintain his son, until he should attain the age of twenty-one years; and afterwards in trust to convey all the rest of his real estate to his son and heirs. And after the testator's death, the estate was conveyed to his wife, who died before the son attained twenty-one; but he afterwards attained the age, and died in possession of the estate. The lessor of the plaintiff was heir at law on the part of his mother; and the defendants were his heirs at law on the part of his father's mother. Lord Mansfield said: A. B. after his purchase was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance was absolutely in trust for the son. He outlived his mother, by whose death the trust estate was completely vested in him, and the legal estate descended to him from her. The question was, to whom the estate descended on the death of the son? If it descended from the mother, the lessor of the plaintiff took it as heir at law; but it was contended that, though he was heir, there was a trust for the paternal heirs; and it was said to be settled, that the Court would suffer a trustee to recover in ejectment against a *cestui que* trust. A case so circumstanced as this, in every particular, probably never existed before, and perhaps never might again; but cases must often have happened in which the question would arise, viz. whether when *cestui que* trust takes in the legal estate, possesses under it, and dies, the legal and equitable estates should open on his death, and be severed for the different heirs. Consider this case first, upon authority; and, secondly, upon principle. First, no case has ever existed where it has been so held; none where the heir at law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination; who would have taken the equitable estate if that and the legal estate had not united. Secondly, on principle, it seems to me impossible; for the moment both met in the same person, there was an end to the trust; he had the legal interest in all the profits by his best title. A man could not be trustee for himself. Why should the estate open upon his death? What equity had one set of heirs more than another! He might dispose of the whole if he pleased; if he did not, there was no room for Chancery to interpose, and the rule of law must prevail, *quacunque via data*; therefore the lessor was entitled. If the question was doubtful, then in the Court of King's Bench the legal right must prevail: if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendant. Judgment for the plaintiff.

(f) *Proximity to collateral ancestor last seized must be by whole blood.*†

* Where a person seized *ex parte materna* makes a feoffment in fee, and the use is expressly limited to the feoffee and his heirs; or if there is no declaration of uses, and the feoffment is not on such a consideration as to raise a use in the feoffee, so that the use results to the feoffer in either case, he is in of the ancient use, and not by purchase, therefore the descent is not altered; 1 Inst. 12. b; 1 Rep. 100. b.

† And in the late case of *Langley v. Sneyd* (1 Sim. and Stu. 45.), where an infant died seized of an equitable estate, descending *ex parte materna*, the legal estate being vested in trustees, his incapacity to call for a conveyance of the legal estate (by which the course of descent might have been broken) was held to be not a sufficient reason to induce a court of equity to consider the case, as if such a conveyance had actually been made, it not being according to the terms of the lease any part of the express duty of the trustees to execute such conveyance.

‡ With reference to this and the preceding rule, it is to be observed that, "in order to constitute a good title, the party must be the nearest collateral heir of the whole blood of the person last seized, on the part of the ancestor through whom the estate descended. When Lord Hale speaks of the nearest collateral relation of the whole blood of the person last seized, and of the blood of the first purchaser, he means the latter branch of the expression as a qualification of, and not an addition to, the first branch, that the collateral heir of the whole blood must claim through the ancestor from the estate descended, and thus be of the blood of the first purchaser. Per Leach, Vice-Chancellor. *Hawkins v. Shewen*, 1 Sim. and Stu. Rep. 257; which case and the pedigree annexed to the same de-

Collateral
heir must
be next col-
lateral kins-
man" of
the whole
blood.†

[49]

The sixth rule or canon is, that the collateral heir of the person last seized must be his next collateral kinsman of the whole blood;† 2 Bl. Com. 224.

serve attention. On account of the qualification required for the heir to be of the blood of the first purchaser, or acquirer of the estate, it may not unfrequently happen, that the person upon whom the inheritance devolves in a regular and legal course of descent or succession, is not (as independently of, and laying aside this qualification) heir or next of kin to the person last seized of it, either in the paternal or maternal line. It appears that Lit, tleton and his commentator, Lord Coke, (Ten. s. 6. fo. 11. b.) have laid down a different doctrine, "touching the necessity of the person who inherits being always heir, or the worthiest and nearest relation to the person last seized;" but it is conceived that the rules must be taken together in a connected view; and, as such, the rule will stand thus: "that the person or persons who inherit, and upon whom the law casts the inheritance upon the death of the person seized, must always be the worthiest and nearest of such of the relatives of the whole blood of the person last seized, as are of the blood and consanguinity of the purchaser, and such as are not incapacitated by the first rule of descent." Rob. Inn. 46. 47.

* Either personally or jure representationis, which proximity is reckoned according to the canonical degrees of consanguinity; therefore the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second; see 2 Bl. Com. 224.

† That is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit; see Grand. Const. c. 252; Bract, fo. 65. a.; Britton. c. 119. 10; Ass. pl. 27; Bro. Ab. Tit. Descent; 20 Litt. s. 6 and 7.

‡ And here, says Sir W. Blackstone (2 Com. 226,) it must be observed, that the lineal ancestor, though (according to the first rule) incapable of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring.

This total exclusion of the half blood, from the inheritance being almost peculiar to our own law, is looked upon as a strange hardship, by such as are unacquainted with the reasons on which it is grounded; see 2 Bl. Com. 228. But this circumstance arises from a misapprehension of the rule. It should be remembered that, the great principle of collateral inheritances being, that the heir to a feudum antiquum must be derived in a lineal descent from the first purchaser, it was originally requisite to make out the pedigree of the heir from the first donee, and to show that such heir was his lineal representative. But, in the course of time, proof of an actual descent from the first feudatory became impossible. In lieu of it, it was therefore only required that the claimant should be next of the whole blood to the person last in possession, or derived from the same couple of ancestors, which it was thought would probably answer the same purpose, as if he could trace his pedigree in a direct line from the first purchaser; for he, says the learned commentator, vol. ii. p. 228., who is A. B.'s kinsman of the whole blood, can have no ancestors beyond or higher than the common stock, but what are equally A. B.'s ancestors also, and A. B.'s are vice versa his; he is therefore very likely to be derived from that unknown ancestor of A. B., from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestor's above the common stock, the same as A. B., and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser. Nor should this be thought hard, that the brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all; for it has been seen, that in feudis strictæ novis, neither brethren nor any other collaterals were admitted. As, therefore, the reasonableness of excluding half blood in feudis antiquis has been seen, if by a fiction of law a feudum novum be made descendible to collaterals, as if it was feudum antiquum, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent; 2 Bl. Com. 229.

Mr. justice Blackstone (vol. ii. p. 231.) is, however, forced to acknowledge that the principle of exclusion is in some cases carried too far, and adduces the case of a man having two sons by different venters, in which instance the estate would descend from him to the eldest, the entering of whom, and dying without issue would exclude the younger son from inheriting the estate, because he was not of the whole blood to the last proprietor. He observes, that this carries a hardship with it, even upon feudal principles, for the rule was introduced only to supply the proof of a descent from the first purchaser: but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient.

It may be here remarked, that both previous to and since the establishment of the doctrine of trusts in the Court of Chancery, the rule of possessio fratris has been applied to such es-

2. GOODTITLE, D. NEWMAN, V. NEWMAN. H. T. 1774. C. P. 3 Wils. 516.

A. Newman being seised in fee of four messuages, and having issue four daughters, died, leaving his second wife ensient with a son, who was born six weeks after the death of his father, and lived five weeks, and then died; his mother, continuing all that time in possession of the houses, residing in one of them with the two daughters, and receiving rent for the others. The question was, whether this was such a seisin as would exclude the daughters from inheriting. It was argued for the plaintiff, the heir at law of the son of the whole blood, that the son died last actually seised in fee of the premises; that, upon the death of the father, the premises descended to his two daughters, who, together with the mother, being ensient with a son, were then in rightful possession; that, upon the birth of the son, six weeks after, the estate of the daughters was divested out of them, and the mother then became, and was, guardian in socage to her; that her possession, and receiving the rents and profits, was the actual possession and seisin of the son, and would carry the descent of the premises to the heir at law of the son. The infant son was in possession as much as it was possible for an infant to be; for he was born, lived, and died, in one of the houses, which gave a title to the heir of the whole blood; for the law would presume that the mother entered rightfully, as guardian to her infant son, and not wrongfully. On the other side, it was contended for the defendant, that the rule of *possessio fratris* was extremely severe, and ought not to be extended, but should be construed as favourably as possible for the daughters; that to make a *possessio fratris*, their ought to be an actual seisin; that it was not found or stated in the case; that the mother entered as guardian in socage, but that she and the two daughters continued in possession from the time of the husband's death; that six weeks after the husband's death, the son was born, and died in the same house; that this was a continuance of the old estate in herself and the daughters, or in the daughters only; for the law would adjudge the possession in those who had a lawful right to the possession, namely, the daughters; and the Court could not determine, upon the facts stated in the case, whether the mother was in possession as guardian to the son, or as a trespasser, or for her quarantine, in order to have dower.

De Grey, C. J., having stated the case, delivered the unanimous opinion of the Court.—“This is an ejectment brought by the heir of a posthumous son, to recover the premises in question, which were purchased by his father, who died seised thereof in fee simple, the 4th of June, 1760, leaving two daughters by his first wife, and his second wife ensient with this posthumous son. The wife and daughters remained in the same house where the father died; then this wife received some rent for the houses; and afterwards, in July, 1760, the son was born, and, in his life-time, the widow received more rent; then the son died, having lived five weeks and three days, and she received more rent after his death. Lands in fee simple must descend to the heir of the whole blood of the person last actually seised thereof. And this is a maxim in the law of England, which has subsisted for ages, as appears by Bracton, vol. ii. p. 65; Britton, cap. 119. p. 271; Fleta, vol. vi. cap. 1. s. 14. Although this may sometimes be very hard upon some children of the half-blood

tates as fully as to legal ones; see 1 Inst. 14. b.; Dyer, 10. b.; and 3 Cru. Dig. 896. So, advowsons, tithes, and rents descend to the whole blood, provided there be an actual seisin by presentation to the church, or receipt of the tithes or rent, but if the eldest son dies before the church becomes vacant, or any receipt of tithes or rent, his brother of the half blood will inherit, as heir to his father, who was the person last seised; see 1 Inst. 15. b.; 3 Rep. 41. b.; 3 Com. Dig. 396; 1 Roll. Abr. 628. pl. 10, 11, 12, and 13. And in the Institutes (1 Inst. 15. b.) Lord Coke says, that the doctrine of the half blood extends to offices, courts, liberties, franchises, and commons of inheritance.]

An exception to this rule, it will be, however, seen, exists in the case of the descent of the crown of England, and of estates tail; vide post, Div. VII.

* So, the possession of a termor for years is the possession of the person entitled to the freehold; 1 Inst. 15. a; 3 Rep. 41. b. So, the possession and seisin of one tenant in common is the possession and seisin of the other, and it has been determined that such a possession will exclude the half blood; Mod. 868; Hob. 120.

of the person last actually seised, yet we must take the law as it is and determine accordingly. The question, therefore is, whether this posthumous son was actually seised of the premises in question. Upon the death of the father, his two daughters would have been good tenants to the præcipe before the birth of the posthumous son, who could not lay his title before he was born; the law vested the seisin in law in the daughters, upon the death of the father, and, in like manner, vested the seisin in law in the son the moment he was born. If the daughters had aliened, or been disseised, the son would not have been actually seised, but would only have had a right of entry upon the possession of the alienee or disseisor. This was the ground of my brother Hill's argument; namely, that the daughters were disseised by the mother; and that the son died having only a right of entry, so was never actually seised. But the daughters were in actual possession, as well as the mother (of one house) from the time of the death of their father until the birth of the son; and were also in actual possession of the other three houses by the possession of the tenants thereof, whether any rent had been due, received, or not received, before the birth of the son; 3 Rep. 41, 42; Moor. 125; Co. Lit. 14, 15. And the rent which was due and received before the birth of the son belonged to the daughters, who were actually seised; for, by Babington, C. J., C. P. Trin. 9 Hen. 6. 25. a., if a man has issue a daughter, and dies, his wife being ensient, the daughter may lawfully enter; and, if she dies, her heir may enter, and take the profits for the time; and afterwards, if the wife, being ensient by the ancestor paramount, is delivered of a son, the son may enter notwithstanding that the heir of his sister is in by descent; but he shall not have an action of account, or any remedy for the issues in the mean-time, before his birth; because their entry was congeable until he was born. And, if a church becomes void, and the sister or heir present, and their presentee be instituted and inducted before his birth, he shall not have the advantage of the avoidance; and yet, by such presentation, he shall not be out of possession. At the time of the birth of the son (in the present case), his mother was in possession, as well as the daughters. The moment he was born, she became guardian in socage; and, upon supposition that nothing was done to hinder it, the law will presume that she entered as guardian to her son the moment he was born; and nothing appears to the contrary upon the facts stated in the case. She was in, without any declaration how she was in; and acts, without any words, amount, in law, to an entry; for acts, without words, may make an entry; but words, without an act (viz. entry into the lands, &c.), cannot make an entry. It was objected, that the mother being in one house, and receiving the rents of others, was a disseisor, or that it was in the daughters to make it disseisin; Cro. Car. 303; and that if one enters as guardian who is not so, he is a disseisor; 1 Roll. Abr. 662. (I.) pl. 3. in answer to this. The facts in this case are, that the mother continued in possession from the death of her husband, received the rents under leases; her possession was general; it does not appear that she ousted the daughters, or made any actual or particular claim; she might continue in the house by quarantine, which continued until the son was born; and the entry of one is the entry of others, who have a right to enter; 1 Roll. Abr. 740, 741. If guardian by nurture make a lease by indenture to one, being under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant; 1 Roll. Abr. 659. pl. 13. It is to be observed, that the title of the daughters expired on the birth of the son, before any election to make the mother a disseisor was made, that the law will not presume a wrong; there was never any determination, that the mother's entry, or possession, was by wrong in a case like this; and it is impossible to suppose, in this case, that the whole rents and profits of the premises in question were not applied by the mother to the common use of her daughters, herself, and her infant son. Indeed, if the mother had entered as guardian to the daughters, she not being their guardian, it would have been a disseisin; so, if she had entered for her dower, when it was not assigned to her. The possession of the mother and

daughters was the possession of the daughters; and, when the son was born, the estate was divested out of the daughters, and not before; then the son was in actual possession and seisin of the premises by his mother, who had a right to the possession, as being his guardian by law; namely, the person next of blood, to whom the inheritance cannot descend; her possession was the possession of the son; 3 Rep. 42; Moore, 125. A guardian need not be assigned. The seisin of a guardian of a son by the second venter shall oust the daughter of the first venter; 8 Assise, 6. Upon the whole, we are all of opinion that the premises in question belong to the lessor of the plaintiff; and, therefore, we give judgment for the plaintiff. See Prec. in Ch. 283.

3. *DOE, D. BARNETT, v. KEEN.* M. T. 1797. K. B. 7 T. R. 386.

A man died having two daughters by different venters; the mother entered as guardian in socage, and received the profits. The question was, whether this gave such a seisin to the daughters, that, on the death of one of them, the other could not inherit from her. It was contended; 1st, That the entry of the mother as guardian in socage and her receipts of the profits amounted to a sufficient seisin for her daughter; that this point was sufficiently established by the preceding case; 2d, That the seisin of one coparcener was the seisin of the other, and the entry of one was, in law, the entry of the other. Where two claim by the same title, as two sons from their father, and the younger son enters, the law will presume that this entry was not to gain a possession distinct from his elder brother, but merely to preserve the estate from a stranger; therefore, though the younger son die seised, and his heir enters by descent, yet the entry of the elder brother, or his heir, is not therefore taken away. That if the law put so favourable a construction in that case, where the younger son cannot have any claim for himself, *a fortiori* such a presumption should be made in the case of coparceners, who make but one heir; and so it was stated in 1 Inst. 243. b. that where one coparcener enters generally and takes the profits, this shall be accounted in law the entry of both, and no divesting of the moiety of her sister. On the other side it was argued, that their was no seisin in fact by the elder sister, but at most a seisin in law; and the Court would not incline to extend the operation of the rule, excluding the succession of the half blood, beyond the strict letter of it. Lord Kenyon said, that nothing could be clearer than that an infant might consider whoever entered on his estate as entering for his use. The Court held that the surviving sister did not take by descent; but the lands should go to the heir of the whole blood of the sister who died.

And the above decision has been since confirmed

[53]

g) *In collateral inheritances male stock preferred to female, unless estate descended from females.*

The last canon or rule of descent is, that in collateral inheritances, the male stocks shall be preferred to the females, that is, kindred from the blood of the male ancestor however remote, shall be admitted before those from the blood of the female however near, unless where the lands have in fact descended from a female; 2 Bl. Com. 235.

Collateral male stock preferred to female, unless estate descend from the latter.*

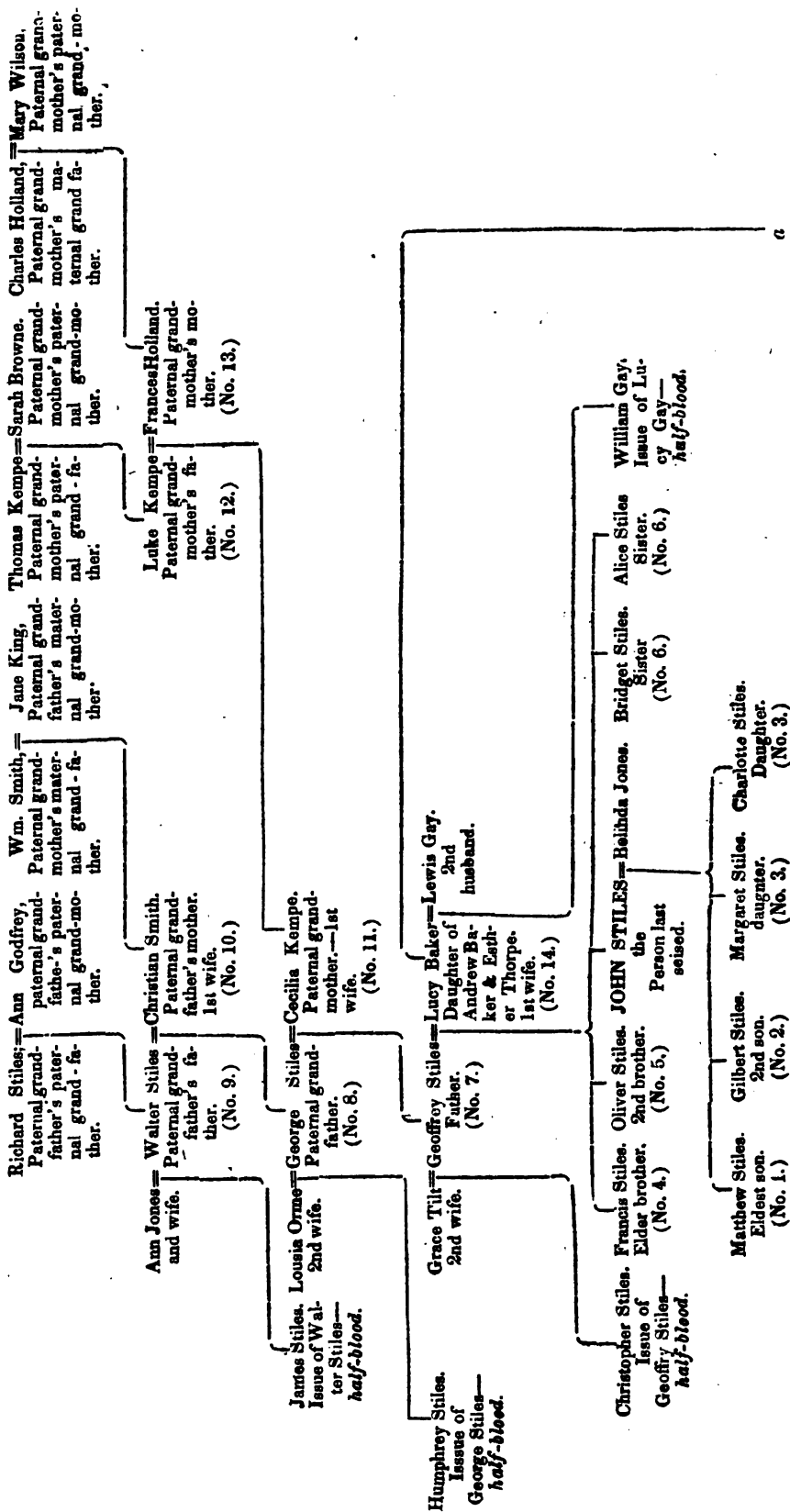
3. *Mode of tracing an heir at law.*

It may not be here unacceptable to introduce in the note an epitome of the manner in which, according to the table of descent subjoined, the heir at law would be ascertained, taking John Styles as the person who dies seised of land,

* Sir W. Blackstone observes, that this rule was established in order to effectuate and carry into execution the fifth rule or principal of collateral inheritance, that every heir must be of the blood of the first purchaser; for when such first purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavored to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males, by virtue of the second canon, through the whole course of lineal descent from the first purchaser, they judged it more likely that the lands should have descended to the last tenant, from his male than from his female ancestors. The right of inheritance, therefore, first runs up all the father's side, with a preference to the male stocks in every instance, and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser; see 3 Cruise Dig. 398.

TABLE OF DESCENTS.

PATERNAL LINE



MATERNAL LINE.



which he acquired, and which therefore he held as a feud of indefinite antiquity.*

[54]

2dly. Of estates in remainder or reversion.

KELLOW v. ROWDEN. T. T. 1688. K. B. 3 Mod. 253; S. C. 3 Lev. 286; S. C. Carth. 126; S. C. 3 Salk. 178; S. C. 1 Show. 244; S. C. Holt. 71. 336.

A person who claims a remainder or reversion by descent, must establish that he

[55] is heir to the first purchaser at the time when it comes into possession.†

In this case the Court held, that where an estate for life, or in tail, is created, and the reversion in fee expectant thereon descends from the donor or settlor through several intermediate heirs before it falls into possession, every person claiming it by descent must make himself heir to the donor or settlor, and take it as such, and not as heir to the intermediate heirs, who need not be so much as named in action brought against the person so acquiring the possession as heir to the donor or settlor; for the intermediate heirs never had such a seisin as to transmit the reversion from them by descent to any person who was not heir to the donor or settlor.‡

* In the first place, says Mr. Justice Blackstone, succeeds the eldest son, Matthew Stiles (see Genealogical Table annexed,) of his issue (No. 1.); if his line be extinct, then Gilbert Stiles and the other sons, respectively in order of birth, or their issue (No. 2.); in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue (No. 3.) On failure of the descendants of John Stiles himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in; viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue (No. 4); then Olive Stiles, and the other whole brothers, respectively, in order of birth, or their issue (No. 5); then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue (No. 6). In default of these, the issue of George and Cecilia Stiles, his father's parents, respect being still had to their age and sex (No. 7); then the issue of Walter and Christian Stiles, the parents of his paternal grandfather, [No. 8]; then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father [No. 9]; and so on in the paternal grandfather's paternal line or blood of Walter Stiles, in infinitum. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother, [No. 10]; and so on in the paternal grandfather's maternal line or blood of Christian Smith, in infinitum, till both the immediate bloods of George Stiles, the paternal grandfather, are spent. Then we must report to the issue of Luke and Frances Kempe, the parents of John Stile's paternal grandmother [No. 11]; then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father [No. 12]; and so on in the paternal grandmother's paternal line or blood of Luke Kempe, in infinitum. In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother (No. 18); and so on in the paternal grandmother's maternal line or blood of Frances Holland, in infinitum, till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent. Whereby the paternal blood of John Stiles entirely failing, recourse must then and not before be had to his maternal relations, or the blood of the Bakers [Nos. 14, 15, 16]; Willis [No. 17]; Thorpes' [Nos. 18, 19]; and Whites' [No. 20], in the same regular successive order as in the natural line.

† And herein the descent of estates in possession, does not apply to the descent of estates in remainder or reversion, expectant on an estate of freehold; see 3 Cru. Dig. 429.

So a right to an estate in remainder or reversion goes to the half blood; for, where a person, having such a right, dies before the estate in remainder or reversion falls into possession, he cannot acquire such a seisin as to become the stock of an inheritance. Therefore his heir of the half blood, if he is heir to the donor or settlor of the remainder or reversion, will become entitled to it; see 1 Rol. Abr. 628. pl. 6, 7, 8, 9; 1 Inst. 14. b., 15. a; *ibid.* n. 5; 1 Ves. 174; 2 B. & P. 642.

But where the person entitled to a remainder or reversion exercises an act of ownership over it, by granting it for life, or in tail, this is deemed equivalent to an actual seisin of an estate, which is capable of being reduced into possession by entry, and will make the person exercising it a new stock, a root of inheritance; for an entry being impossible, the alienation of the remainder or reversion for a certain time is allowed to be sufficient to change the descent; because such alienation, being formerly always attended with attornment, was deemed equal in point of notoriety to an entry or a descent; see 1 Inst. 15. a; 8 Rep. 35. b; *ibid.* 191. b; 9 Mo. 263; 3 Cru. Dig. 434.

‡ The following facts are disclosed in the case of Jenkins v. Prichard, 2 Wils. 45:—D. Smith, in consideration of his marriage with Sarah Madey, in 1716, settled the premises in question to the use of himself and the said Sarah, during their natural lives, and the life of the survivor of them; remainder to the heirs of the body of the said Sarah, by the said David; remainder to the said David his heirs and assigns for ever. There was issue of the marriage one daughter, named Elizabeth, and no other child. Upon the death of the said Sarah, David Smith married a second wife, and by her had issue, Ann, the lessor of the plaintiff, and no other child. Elizabeth, the daughter of the said David by Sarah his first wife, intermarried with John Waters; and upon that marriage, David Smith delivered up the possession of the premises to John Waters, but did not execute any conveyance thereof to him. In 1738 David Smith died, having issue only Elizabeth by his first wife, and

(B) BY STATUTE LAW.

The descent of an estate tail in some respects differs from descents of fee-simple. They are regulated by the statute *De Donis Conditionabilibus*, and thus comes the appellation of *descent by statute law*.

The descent of an estate tail resembles that of a *feudum novum*; for the person to whom an estate tail is originally given, or limited, is the first purchaser of it, and none but those who are lineally descended from him can derive a title to it by descent; see 3 Cru. Dig. 438.

The maxim *seisina facit stipitem* ante, p. 35. n.) does not apply, it being only necessary, in deriving a title to an estate tail, to deduce the pedigree from the first purchaser, and to show that the claimant is heir to him; for the issue in tail claim *per formam doni*; 2 Cru. 439. Nor is the rule as to the exclusion of the lineal ancestors applicable, inasmuch as it must have passed them already before it came to the stock from whence the descent is now to be derived; *vide ante*, p. 40. But the male issue in tail shall be admitted before the female; *ante*, p. 42; unless where the estate is limited in tail female, in which case the male issue could never be admitted; H. Chit. Desc. 156. The third rule, of descent relating to primogeniture and coparceny also applies in the descent of estates tail; *ante*, p. 43. The right of representation also takes place; *vide ante*, p. 44; and the issue of any deceased person shall stand in the same place as the person himself would have done had he been living; that is, if such issue are capable of being heirs *secundum formam doni*.*

See Litt. s. 23; Co. Litt. 25. a. id. b; 3 Rep. 41. b; 2 Bl. Rep. 695; Burr. 2609.

2. Doe, d. GREGORY, v. WHICHELO. E. T. 1799. K. B. 8 T. R. 211.

Per Lord Kenyon, C. J. In the case of estates tail, the half-blood, coming within the description of the entail, may inherit as effectually as the whole blood. There the rule of *possessio fratris* does not apply. Neither does it in the case of peerages. Nor does that rule hold even with respect to inheri-

Ann by his second wife; and about twelve months after Elizabeth died, leaving issue one son, who was born after the death of David, his grandfather, and died an infant, soon after the death of his mother. The said David Smith had no brother; but left a sister, named Jane (married to one Gilbert), who was heir at law to Elizabeth the daughter of David Smith, by his first wife and to her son; and upon the death of John Waters, Gilbert and his wife entered on the premises. Ann, the daughter of David Smith by his second wife, claimed the estate, as heir at law to her father; and brought an ejectment against Gilbert and his wife. Sergeant Wilson reports the Court to have been of opinion that Ann had no title to the premises. But, as noticed by Mr. Cruise, Dig. vol. iii. p. 431. it is truly observed by Mr. Watkins, in his Essay on the Law of Descents (2d edit. 148. n. g.), that the judgment is evidently mis-stated, or wrongfully printed; that in a note of this case, taken by Mr. Sergeant Hewitt, afterwards Lord Chancellor of Ireland, the adjudication is thus given—"In this case it was clearly agreed that, by the settlement of 1716, David Smith was tenant for life; his wife was tenant in tail, with the reversion in David Smith, and thereupon this point was made, whether the reversion in fee descended upon the two daughters of David, viz. Elizabeth by his first wife, and Ann by his second wife, in such manner as that, upon the determination of the estate tail, which descended upon Elizabeth, and from her upon her son, and expired by his death without issue, it should go in moieties; viz. one moiety to Ann and the other to the heirs of Elizabeth; or whether it should not go all to Ann, as heir to her father, who was last actually seised of the reversion. The judges were of opinion, "that though the reversion descended upon the two daughters of David on his death, yet they were not actually seised of that reversion during the continuance of the estate tail, but the same was expectant thereon; and as whoever takes by descent must take as heir to him who was last actually seised, therefore Ann took the reversion wholly as heir to her father. And as to this 1 Inst. 14, 15, and Kellow v. Rowden, in Carthew and Shower, were held to be authorities in point." Lord Alvanley has observed, that the above case was mis-stated in Wilson; as also the reasoning showed it must have determined in favor of the lessors of the plaintiff.

* As if an estate is limited to A. in tail male, and A. has issue two sons, the eldest of whom dies, having issue a daughter, such daughter would be incapable, by reason of her sex, of claiming under the entail, and therefore no representation could take place, but the younger son would succeed to the estate on the death of the father; see B. Chit. Desc. 156.

† Because the descent from the first purchaser or original donee of the estate, must be strictly proved; and when the lineage is thus made out there is no need of this auxiliary

- [57] tances in fee simple, unless there be an actual possession of the brother, or that which has been deemed equivalent for in that respect there is a difference between freehold and chattel leases outstanding. In the former case, unless the elder brother afterwards obtain possession by the receipt of rent, or other acknowledgment, the descent will be to the younger brother of the half blood in preference to the sister of the whole blood; but, in the case of a chattel lease outstanding, the possession in the tenant is the possession of the landlord; and there the rule of *possessio fratris* attaches; *vide Doe v. Keen*, 7 T. R. 390; Co Litt. 15. a. and Jenk. 242. In this case it clearly appears that the children of Elizabeth Lemmon took estates tail under her will.

(C) BY CUSTOM.

1st. *Borough English*; *vide ante*, tit *Borough English*, vol. iv. p. 655.

2dly. *Copyholds*; *vide ante*, tit. *Copyholds*, vol. 6. p. 349.

3dly. *Gavelkind*; *et vide post*, tit. *Gavelkind*.

The descent of lands held in gavelkind, in the right line, is among all the sons as coparceners, and, in default of sons, among all the daughters in the same manner; but though females claiming in their own right are preferred to males, yet they may inherit together with males by representation; for the right of representation takes place in customary descents as well as in descents at common law; Litt. s. 210. 265; Rob. Gav. 90.

The particle quality of lands held in Gavelkind is not confined to the right line, but is the same in the collateral line; 1 Inst. 100. a; Rob Gav. 92.*

evidence; see 3 Cra. Dig. 439; therefore, if tenant in tail dies, having issue by one venter a son and a daughter, and by another venter a son, and the eldest son enters and dies without issue, in this case the son by the second venter would succeed, though of the half blood only, to the exclusion of the daughter, who was of the whole blood to the person last seized; for the son, by prerogative of his sex, had a preferable claim as heir to the entail; H. Chitt. Desc. 159. Although estates tail are made forfeitable by attainder for treason, yet it is laid down by the Court of Exchequer, in Dowie's case, (8 Rep. 10) that neither the act nor the attainder makes any corruption of blood as to the descent of land in tail; and see S. p. Cro. Eliz. 28; 8 Rep. 165. b. The reason is obvious, because the issue in tail claims *per formam doni*, that is, he is as much within the view and intention of the gift or settlement, and as personally and precisely described in it, as his ancestor; but this is not all; the forfeiture of estates tail came in by the construction of the statute of 28 H. 8. The judges resolved that the general words of those statutes comprehended these estates; but then such laws being of a penal kind though they are to be construed as to attain their full effect, yet they are to be construed strictly; and, however they might extend to make estates tail liable to forfeiture where they are actually in the offender's possession, and consequently in his power to alienate, they could by no rule of construction be extended to bring consequential disabilities on the heir, where the estates have not been in the offender's possession; see *Yorke on forfeitures*, p. 82. 4th edit.

* Upon this have been founded many discussions as to the extension of partibility in the collateral line any farther than brothers; but the question, it is to be believed, has never yet been decided in a judicial way. In the case of *Gooding v. Gooding*, which was to have been tried at the Spring Assizes, at Maidstone, in 1820, but was afterwards compromised in favour of the heir in gavelkind, (cited H. Chitty's *Descents*, 188.) the question was between James Gooding, the son of John Gooding, a first cousin, and Richard Gooding, his uncle, the elder brother of the plaintiff's father; the latter claiming the whole, as heir at common law; and the former claiming a moiety, he share to which, according to the custom, he would, as representing his father, have been entitled, as co-heir in gavelkind with his uncle. The opinions of several gentlemen in the profession were taken on the occasion, viz. Mr. Peckham, Mr. Preston, and Mr. Butler.

Mr. Peckham and Mr. Butler were of opinion that the custom did not extend beyond brothers; the former observing, that from the authorities in exemplifying the custom in the transversal or collateral line being thus confined to the cases of brothers and their descendants, taking jure representationis, and, from the total silence in the books as to any further extension of the custom, he had ever drawn the conclusion that such was the extent of the custom. Mr. Butler also grounds his opinion on the want of precedents. Mr. Preston writes thus; It is assumed by Mr. Peckham, that the custom of gavelkind is confined to sons and brothers; but I have always understood that the custom of gavel-kind extended through all the branches of inheritance, so that sons, grand-uncles, uncles, and nephews, might be co-heirs; and I have never found an instance in which the application of the custom has been objected to the claimant, even when the claimant has been in a more remote degree than a nephew. In the late case of *Crump, d. Wooley, v. Norwood*, 7 Taunt. 362. it was taken for granted that a nephew might take as heir, and this was also admitted in *Robinson's*

A remainder or reversion of gavelkind lands, being but the residue of the estate in land, shall descend in the same manner as lands in possession of the same tenure would do; *vide ante*, p. 56. As if an ancestor dies seised of gavelkind lands in reversion or remainder in fee, or fee-tail expectant on an estate for life, or in tail, this shall be divided among all the heirs male; and a remainder in borough English would likewise be subject to the same customary descent in an estate in possession of the same tenure; and where borough English lands are in settlement, the reversion which remains unsettled is considered as part of the old estate, and will descend accordingly; see H. Chit. Desc. 242. [56]

It is a rule, that the customary descents in gavelkind or borough English cannot be altered by any limitation of the parties; therefore, where A., seised in fee of lands held in borough English, made a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, the words "according to the course of the common law" were held void; for customs which go with the land, as this one and gavelkind, and fix and order the descent of inheritance, can only be altered by parliament; Jenk. Cent. 5; Dyer, 179. b.

VI. RELATIVE TO THE DESCENT OF INCORPOREAL HEREDITAMENTS.*

(A) ADVOWSONS.

On the death of the owner of an advowson, the law immediately casts the descent upon his heir, and he thereby acquires a seisin in law. Such seisin in law is not sufficient to make the heir an ancestor from whom all future claim-gavelkind, 93. *Beviston v. Husey*. It is true that no authority occurs to my memory in which a more remote cousin has succeeded. On the other hand, I am not aware of any authority which can exclude any of the descendants of an uncle or aunt from taking under the custom in gavelkind and jure representationis, when the customary heirs are in the different degrees of consanguinity.

These opinions, and other remarks connected with the subject; will be found at length in Mr. Henry Chitty's Treatise on Descents, p. 183.

* It may not be inappropriate to notice the law connected with the descents of certain rights appertaining to realty, which are not classed in the text; such as conditions, powers, rights, possibilities, and terms attendant, as also to refer to certain interests in land, of which the courts of law do not take cognizance, and which are solely under the guidance and protection of courts of equity. A condition being an inheritance entirely of a new creation, and independent in its nature of the estate to which it is annexed, will always descend to the heir at law, and not to the heir to the estate; and he will be the proper person to enter for the breach of the condition; thus, for a breach of a condition annexed to a grant of lands in gavelkind or borough English, the eldest son in both cases will be entitled to enter. But, on the entry made by the heir at law, the ancient estate will be revived; the heir is in of the old estate, and consequently by descent; (Jenk. Cent. 249. pl. 40; Co. L. 126. 176. a. 202. a. b; 1 Co. 95. a. 99. a; F. N. B. 143, Wark. Desc. 267; Rol. Abr. 474; Dyer, 344. a; 4 Co. 24. a; Co. Cop. 82. 88. 1 Bac. Abr. 660.) Thus, if a man makes a feoffment in fee of lands in borough English, the heir at common law, that is; the eldest son, shall enter; but the younger son shall enter upon him, and enjoy the estate; (Gobb. 8.) If a condition be annexed to lands descending ex parte materna (Co. L. 11; 12 Lamb. 608.), the heir on the part of the father, who is heir at common law, shall enter for a breach of the condition; but the heir on the part of the mother shall enter upon him, and enjoy the land; (1 And. 184. 2nd. edit. 22; 1 Inst. 12. b; 2 Cru. Dig. 44. 3rd. edit. 363.) but this doctrine has been questioned, and is declared by Mr. Preston to be an anomaly, and a departure from first principles; Rob. Gav. B. 1. c. 6. p. 121; 2 Prest. Abr. 427. Conditions are subject to forfeiture for attainder. By the common law, the King was not entitled to conditions vested in persons attainted; nor were they forfeited by any act in which they were not expressly named; for, by the general words of all hereditaments "they would not pass, although clearly hereditaments;" Winchester's case, 3 Rep. 1. But, by the 33 H. 8. c. 20. the benefit of rights, entries, and conditions, was expressly given to the crown, that is, not the land itself, but the benefit of the condition only, by which the land might be reduced into the possession of the party attainted, had he not been attainted; see 1 Hale, P. C. 244. a. 4; 2 Hawk, P. C. 453. a. 26; Sudg. Pow. 171. 2nd edit.; H. Chit. Desc. 250.

As to the descent of powers, it should seem that such as are annexed to an estate, and to be enjoyed with it, will descend accordingly, as an appendant to the same; for instance, a power may be given to the grantee of a rent, which is limited in use to him and his heirs, to enter and hold till payment of the arrears; and such power will follow both the descent and alienation of the rent; but as to those powers which are not to be considered as appurtenant, but powers in gross, the same being limited for an estate which in point of duration is of an

[59]

ants must derive title; but it is required where the advowson is in gross, that he should actually present to the church before he can require a seisin to make him the stock of descent, which presentation makes a seisin and fee, and shows

hereditary nature, will descend to the objects of the limitation of the power in the same manner as has been already noticed with regard to the descent of remainders and reversions; it being sufficiently evident of, a power there can be no seisin which can cause a *possessio fratris*, and render the same descendible as an estate in possession; ante, p. 54, 57.

A right is either of possession, or of property. These arise when one person has the actual possession or seisin of certain lands, and another the right of possession or seisin, or the right of property; as, if a person enters wrongfully into the lands of another, the disseisor will have the actual possession, but the rightful owner may enter and oust him if he please, as the right of possession is still in him. But in this case, if he should not exert his right and make entry within a limited time, his power of entry is taken away, and he is driven to his action to recover the seisin; and if he should not avail himself of such his possessory action, he would have only a right of property, a mere right left; see *Watk. Conv.* 113; *Gilb. Ten.* 21; 2 *Blac. Com.* 195. The right of a disseisor will descend to his heir at law, in the same manner as an estate in possession. But if such heir should die also, then a right like an estate in expectancy, will descend to a brother of the half blood in preference to a sister of the whole; for there can be no seisin to cause a *possessio fratris*, and enable such heir of the disseisor to turn and convert the descent to his own stock of heirs; see *Watk. Desc.* 82. So the writ to bring a writ of error for the reversal of a recovery descends to the person to whom the land would have descended in case the recovery had not been suffered; 1 *Leon.* 261; *Treat. on Recov.* 305; *H. Chit. Desc.* 253.

Possibilities descend to the heirs of the persons entitled to the same; *Bro. Feoffment to Uses*, 59; 3 *Co.* 20; *Poll.* 55; *Co. L.* 219. b.; *Marks v. Marks*, 1 *Str.* 131; 2 *Blac. C.* 290; 2 *Vent.* 347; 1 *P. Wms.* 565. b. Being but the title or right to estates which may probably or possibly arise in futuro, and not any estate in present, they are of course descendible in the same manner as remainders or reversions; for there can be no actual seisin of a possibility. see *Chauncey v. Graydon*, 2 *Atk.* 618; *Forr.* 123; 2 *Burr.* 1134; 3 *T. R.* 88; *H. Chit. Desc.* 254.

Terms assigned to attend being considered as absolutely annexed to, and a part of the inheritance; *Whitechurch v. Whitechurch*, 2 *P. Wms.* 236; 6 *Cru. Dig.* 90; 2 *Atk.* 72; descend with the same to the heir, and follow all alienations made by him. They will follow all estates created out of the inheritance, and all incumbrances subsisting upon the same; and are so connected with it, that equity will not suffer them to be severed to the detriment of a bona fide purchaser; 8 *P. Wms.* 328; 3 *Atk.* 476; 5 *Bac. Ab.* 19; 1 *Cru. Dig.* 510; *H. Chit. Desc.* 255.

Next, as to the descent of estates considered in equity as real property. Of this nature are trust estates, equities of redemption, the benefit of contracts, and money considered as land.

It may be laid down as a general rule, that trust estates are descendible in the same manner as legal ones; 3 *Cru. Dig.* 361. So equities, being still inherent in the land until foreclosed, will descend to and vest in the same persons as the land itself would in case there had been no mortgage or incumbrance whatsoever; 5 *Bac. Abr.* 22; *Hard.* 465. It is not a new kind of inheritance separate and distinct from the original one, but the same inheritance descending under the direction of another court only; *H. Chitty's Des.* 274. It appears to be settled that, in the contemplation of a court of equity, there may be a seisin of an equity of redemption; or, at all events, that there are certain acts, the exercise of which will have the same effect in equity as an actual corporeal seisin would in the consideration of the court of law; *ibid.* 274. It should, therefore, seem that there may be a *possessio fratris*; 1 *Co.* 121. b.; 2 *P. Wms.* 713; *Hard.* 488, 491; 1 *Saund. Uses and Trusts*, 217. But there must have been some act done by the elder brother, equivalent in the eye of the court of equity to a seisin or possession; so as to authorise the claim of the sister. Thus, the receipt of the rents, or bringing a bill for redemption will amount to a seisin; *Mosely*, 72, 122; 1 *Atk.* 604.

With reference to contracts in equity, it may be remarked, that where an ancestor enters into articles of agreement for the purchase of an estate, and dies previous to the completion of the purchase, although such an interest is incapable of an actual seisin, and at law cannot be the subject of a descent, yet, in consequence of the rule, that equity looks upon things agreed to be done as actually performed, a Court of Equity will consider the vendor as a trustee for the purchaser, or his heir, of the estate so agreed to be sold; and the purchaser as a trustee of the purchase money for the vendor; and the estate shall, in the contemplation of such Court, be deemed in such purchaser from the time of the execution of the articles of contract, so as to be capable of being devised by such ancestor, or inheritable by his heir; *Sug. V. & P.* 154; *H. Chit. Desc.* 277.

Again, as to money considered as land; it is a principle of our courts of equity, that any thing which is agreed to be done shall be considered as actually performed. Therefore, where money is covenanted or agreed to be laid out in land, equity, whose duty it is to enforce the execution of agreements, will look upon the money as real estate which will descend to the heir; and this rule of equity applies not only to money covenanted or agreed, as between party and party, but also to money devised, or directed by will to be laid out in land. Seisin does not appear to be necessary in the case of money directed to be laid out

at the same time how it arose, and is the proper evidence of it. Per Lord [60] Hardwicke, *Rex v. Ep. Landaff*, 2 Strange. 1010. For a further illustration of this part of the law, *vide ante*, vol. i. p. 325.

(B) COMMONS. *Vide ante*, vol. v. tit. Common.

Of commons, like all other incorporeal hereditaments, there can be no corporeal entry or seisin. But of such commons as are annexed and appertain to any house or land, a seisin is required by the seisin of such house or land, and without any exercise of such right of common, they will pass with the same. And, even though the right has been put in use, yet, if a seisin has not been obtained of the principal, to which the same is annexed, the right will descend, not to the heir of the person exercising the same, but to the heir of the person who was last seized of the principal; for, the exercise of the appurtenance will not give seisin of the house or land to which the same is annexed. But, of a right to common in gross, there can be no seisin as annexed to a house or land, being a mere personal inheritance; but the exercise of the right alone will give what is equivalent in corporeal hereditaments to a seisin, so as to enable the person exercising such right to transmit the same to his own right heirs; see H. Chitty on Descent, 203, 204.

(C) DIGNITIES.*

It will be seen in a subsequent part of this work, that dignities may be created by writ or letters patent. It appears to have been long settled that, where a person has been summoned to Parliament by the usual writ, and takes his seat in the House of Lords by virtue of such writ, he acquires the dignity of a baron, not for himself only, but also for all his lineal descendants, both male and female; 1 Inst. 9, b. 16. b. The right of primogeniture takes place in the descent to males; and, in default of males, dignities are descendible to female heirs; and by them transmissible to their descendants;† Skin. 436.

in land; for, in the case of *Sweetapple v. Bindon* (2 Vern. 536,) the husband was decreed curtesable, though the money had not been invested according to the trust. The interest of the money did not appear to have been received during the coverture, either by the husband or the wife, so as to form a quasi-seisin of the principal; nor, in fact, is such receipt of interest necessary to entitle a husband to curtesy of money-land, provided the money still continues impressed with the character of land, and remains unconverted into personal property; but, in the case of a descent, it is conceived that there must of this, as of other trust estates, be some act equivalent to a seisin, in order to cause a possessio fratris, and render the owner the stock of descent; Watk. Desc.; H. Chit. Desc. 284; Leigh and Dalzell on the Equitable Conversion of Real Property, ch. 4; *et post*, tit. Devise.

* All dignities were formerly annexed to the possession of certain estates in land. They must, consequently have been created by a grant of those estates, and these were called dignities by tenure. They appear to have always been hereditary, and to have descended in the same manner as the castles or manors to which they were annexed; so that the descent of dignities of this kind, in the male line, was exactly similar to that of estates in land held in fee-simple. And where the castles or manors to which the dignity was annexed were entailed, the dignity descended to the person entitled to such castles or manors under the entail. In ancient times, the right of primogeniture appears to have taken place in the descent of dignities by tenure to females as well as males. For Bracton, in treating of the partition of estates among coparceners, says, that where a mansion or castle was *caput comitatus* or *baronia*, it was not divisible *propter jus gladii quod dividi non potest*; for by such a division earldoms and baronies would be destroyed. *Per quod deficiat regnum, quod ex comitatibus et baroniis dicitur esse constitutum*. Now, as the eldest sister had a right to the principal mansion *jure esneicie*, to which, if it was *caput comitatus* or *baronia* the service of attending parliament appears to have been always annexed, she would, in those times, have been entitled to the dignity. And this was exactly conformable to the feudal law, in which an indivisible fief descended to the eldest daughter. The descent of earldoms and baronies in the reign of Edward I. appears, from the answers of the parliament of England and Scotland, previous to the adjudication of the succession to the crown of Scotland, to have been to the eldest daughter; Raym. Fœd. vol. ii. 583. And Lord Coke has cited a charter of Edward III., in which the right of the eldest sister to the earldom of Pembroke is fully recognized; 4 Inst. c. 440; 3 Cru. Dig. 2. 5.

† In analogy to the nature of dignities may be mentioned the descent of arms and armorial bearings. A man has an inheritance and fee-simple in these (Co. Litt. 27. a. 140. b.) which descend, in the nature of gavelkind, to all the male issue and their posterity; but the eldest shall bear, as a badge of his birth-right, his father's arms without any difference (being more worthy of blood); Litt. s. 5; and all the younger brethren shall give several differences, *et additio probat minoritatem*; Co. Litt. 27. a. 140. b.

On this subject Coke, Co. Litt. 27. a. has the following remarks; the rule that, where

- [62] When dignities by writ were first introduced, they were probably descendible, in default of males, to the eldest female, in conformity with the rule then existing respecting the descent of baronies by tenure. But in course of time it became established, that when a person possessed of a dignity by writ died, leaving only daughters or sisters, as the dignity was of an impartible nature, it fell into a dormant state, and was said to be in suspense or abeyance; 3 Cru. Dig. 219; in which case the Crown has the prerogative of terminating such abeyance or suspension, by nominating any one of the co-heirs to it; *ibid.* 221; so in all cases of abeyance of dignities, whenever the co-heirship determines, by the death of all the daughters or sisters but one; or by the extinction of all the descendants of such daughters or sisters but one, by which there remains only one heir to the dignity, the abeyance is terminated, and the person who is the sole heir becomes entitled to the dignity; *ibid.* 226. But it has been held by the House of Lords in a modern case; *Barony of Beaumont*, printed case, that, when a barony was in abeyance between two persons, the attainder of one of them for high treason did not terminate the abeyance and give to the other a right to the barony.*

- [63] The descent of dignities by writ is, in some respects, different from that of lands; for possession does not affect it; as every person claiming a dignity must make himself heir to the person first summoned, not, as in the case of lands. lands are given to a man and his heirs male he hath a fee-simple, because it is not limited by the gift of what body the issue male shall be, and so it cannot be taken by the equity of the statute *De Donis*, extendeth but to lands or tenements, and not to the inheritance that noblemen or gentlemen have in their armories or arms. For, where a nobleman or gentleman hath a fee-simple in his armories or arms, yet is the same descendible to the heirs male lineal or collateral. For, albeit a female be heir at the common law, yet the shield, armories, and arms, descend unto them that are able to bear them. And all the females of that family, in respect that they be of the same blood, may, in a lexeage or under a curtain, manifest of what family they be, by expressing the armories and arms belonging to that family; and the husbands of them may impale them or quarter them with their own, as the case shall require. And, for distinction and better explanation hereof, if the King by his letters patent giveth lands or tenements to a man and to his heirs male, the grant is void; for that the King is deceived in his grant, inasmuch as there can be no such inheritance in lands or tenements as the King intended to grant. But if the King, for reward of service, granteth armories or arms to a man and to his heirs male, without saying "of the body," this is good, and, as hath been said, they shall descend accordingly.

A man may, with the King's license, grant his arms to another, together with his surname; 4 Inst. 126.

* When the King terminates the abeyance of a barony in favour of a commoner, he directs a writ of summons to be issued to him, by the stile and title of the barony which is in abeyance; as in the cases of Lord Ferrers; *Journals*, vol. xiii. 180; and Lord Le Despencer; *Ibid.* vol. xxx. 403. both cited 3 Cru. Dig. 212. Where the person in whose favour an abeyance is determined is already a peer, and has a higher dignity, then the King confirms the barony to him by letters patent; and, in the case of females, the abeyance is also determined by letters patent. Formerly it was the practice to confirm the barony to the co-heir and his or her heirs; but now it is more properly to the heirs of his or her body; for no one can be heirs of the body of the person in whose favour the abeyance is terminated, without being also lineally descended from the person first summoned: 3 Cru. Dig. 223. Where the abeyance of a barony is terminated by a writ of summons, different opinions have been entertained respecting the extent of the operation of such a writ. Some eminent persons are said to have held, that where a barony is in abeyance between the descendants of two co-heirs, and the King issues his writ of summons to one of the heirs of the body of the two heirs, the abeyance is thereby terminated, not only as to the person summoned, and the heirs of his or her body, but also as to all the heirs of the body of such original co-heir. But the better opinion seems to be that the effect of a writ of summons, in a case of this kind, is only to terminate the abeyance, as to the person summoned, and the heirs of his or her body; and that, upon failure of heirs of the body of the person so summoned, the barony will again fall into abeyance, between the remaining heir or heirs of the body of the original co-heir, one of whose heirs was so summoned, if any, and the heir or heirs of the body of the other co-heir. This latter opinion is founded upon a principle of law that possession does not affect the descent of a dignity: and that a writ of summons to parliament by an ancient title (as the summons of the eldest son of a peer in the lifetime of his father by the name of an ancient barony then vested in the father) will not operate, so as to give any title by descent, collateral or lineal, different from the course of descent from the ancient barony; and that he who claims a dignity must make himself heir to the person on whom the dignity was originally conferred; not to the person who last enjoyed it; see 3 Cru. Dig. 228.

to the person last raised; 3 Cru. Dig. 218. In consequence of this principle, a brother of the half blood shall inherit a dignity in preference to a sister of the whole blood; 1 Inst. 15. b; 3 Rep. 42. a; Cro. Car. 601; Collins. 195; 3 T. R. 213; W. Jones, 96. But if it was a feudal title of honour, as of the Earldom of Arundel, or Barony of Barclay, there *possessio fratris* should hold well, because the title is annexed to the land; 3 Cru. Dig. 218.

The next mode of creation is by letters patent. An advantage exists in such creation over that by writ. In creations by letters patent, if the grantee die before he takes his seat, yet the dignity will descend to his posterity; 12 Rep. 71. Where a dignity is created by letters patent, the estate of inheritance must be limited by apt words, or else the grant is void. Where the descent is marked out, the dignity will of course be transmitted to any class of heirs, according to the limitations of the letters patent. The usual limitation is to the heirs male of the body of the first grantee; and a person claiming a dignity of this kind must deduce his pedigree entirely through males, the brother to the half blood being capable of inheriting; for as Lord Coke says (1 Inst. 156). "the issue in tail is ever of the whole blood to the first donee." In some patents, the limitations are restricted to heirs male by a particular person; and in some also the dignity is limited, in default of heirs male, to the eldest heir female; 3 Cru. Dig. pp. 179. 218. 249.

It is frequent to call up the eldest son of a peer to the House of Lords, by writ of summons, in the name of his father's barony, because in that case there is no danger of his children losing the nobility in case he never takes his seat; for they will succeed to their grandfather: 1 Bl. Com. 400; 3 Cro. Dig. 244; H. Chitty's Dec. 220.

It was resolved by the House of Lords (Journ. vol. iv 150), "That no peer of the realm can drown or extinguish his honour; but that it descends to his descendants: neither by surrender, grant, fine, nor any other conveyance to the King." So also, where one who has been created baron by writ, and has consequently an estate tail general, accepts of an earldom to him and the heirs male of his body, his former title is not merged; for the earldom does not attract the barony: but, although the earldom should become extinct, the barony will nevertheless descend to the heir general; 1 Inst. 15. b. n. 3; Collins, 162. 195. 286.*

(D) FRANCHISES.

[64]

Franchises are enumerated by Blackstone as being counties palatine, corporations, rights to hold courts leet, manors, waifs, wrecks, treasure trove, royal fish, deodands, to have a court of one's own, or liberty of holding pleas, and trying causes; to have the cognizance of pleas; to have a bailiwick exempt from the sheriff of the county, fairs, markets, rights of taking toll; and, in respect of game, a forest, chase, park, warren, or fishery endowed with privileges of royalty; 2 Bla. c. 37, 38. Of such the only seisin of course which

* Hence it follows, says Mr. Chitty on Descent. p. 222. that nobility, when once acquired, cannot be lost or transferred by any other power but that of parliament, except death or attainder; Neville's case, 7 Rep. 38; 1 Bla. Com. 402. For dignities of every description, even in tail, are subjected to forfeiture by the attainder for treason of the person possessed of it, and can only be revived by reversal; Id. Ibid. But in cases of attainder of felony, a dignity in tail is only forfeited during the life of the person attainted; and will, after his decease, *descend per formam doni*; 1 Inst. 392. b. Corruption of blood has not any effect on the descent of entailed dignities; as, for instance, a son may make himself heir to a dignity notwithstanding the attainder of his father, who never came to the possession of the same; 1 Inst. 15. b; 3 Rep. 41. b. 8. T. R. 218; 2 Hale, P. C. 356; 5 Lord's Journal, 30. 466. 469; but it is otherwise with limitations to heirs general; 1 Inst. 8. a. 391. b.; for the blood of the person attainted being thereby corrupted, no pedigree can be deduced through him; so that the dignity will escheat to the crown, and is thereby for ever extinguished; Ibid. As, therefore, a dignity cannot be surrendered, merged, or extinguished, or otherwise lost or transferred, except in the cases before mentioned, it follows that they are not within the statute of limitations, and may consequently be claimed after any lapse of time; and we are furnished with instances of the recognition of claims after their having been, as it were, in abeyance for many centuries; Journals, vol. xxxi. 530. 537; Skin. R. 437; Collins, 323; 11 Rep. 1; 4 Inst. 335; 2 Bro. Parl. Ca. 167, 168; Chitt. Prerog. 116; 3 Cru. Dig. 202; H. Chitty on Descents, 222.

can be obtained, is by the exercise of the peculiar right which such franchise bestows; for there cannot be a corporeal seisin any more than of the other incorporeal hereditaments which have been noticed; see Chitty on Descent, 225.

(E) OFFICES.

All offices which concern or relate to land, or which are to be exercised within any particular district, are considered real property, and are classed among the number of incorporeal hereditaments. As to the estate which may be had in an office, many of the great offices of state were, and still continue to be hereditary; 4 Inst. 58. 127; 5 Bac. Ab. 199; Dyer, 285; 7 Mod. 125. Some offices are described to be, and are called, offices in fee; yet the estate in them is not, strictly speaking, an estate in fee-simple; for it is only inheritable as a *feudum novum*, by the lineal descendants of the first grantee of the office; and would not, on failure of lineal blood, descend in the collateral line; 3 Crug. Dig. 116. Offices which are of a real nature, and which may be granted in fee-simple are also entailable within the statute *De Donis*; Co. Litt. 20. a; 7 Rep. 33. b; 1 Roll. Ab. 838; H Chitty's Desc. 208. Where an office is unalienable, though it may be granted in tail by the crown, as in the case of the office of Earl Marshal, yet it cannot be entailed by the person possessed of it; 3 Cru. Dig. 120, W. Jones, 96; Collins's Claims, 181.

[65] Where an office descends in coparcenery, it is usual to appoint a deputy to exercise the same, not under the degree of a knight; and thus the offices of Earl Marshal and High Constable may be exercised;* Dyer, 285; Keilw. 170. b. Seisin of an office may be obtained by exercise thereof, or by receipt of the profits and fees issuing out of the same; Roll. Ab. 270; 5 Lac. Ab. Office; 2 Lev. 108.

(F) RENTS.

The right to a rent service is real property, and descendible to the person entitled to the reversion of the lands out of which it issues;† 3 Cru. Dig. 325. A rent charge of inheritance is also a real property descendible to the heir. But from the moment that a payment of it becomes due that payment is personal property, and will go to the executor or administrator; 1 P. Wms. 180; 3 Cru. Dig. 327.

(G) TITHES.

1. Tithes in the hands of lay impropriators may be held in fee simple. fee

* It was formerly held on a question of this nature, and Lord Coke says the same, that if a man holds an office and dies, having issue two daughters, the eldest daughter taketh husband, he shall execute the office solely, and before marriage it shall be exercised by some sufficient deputy; Dyer, 285; Keilw. 170. b. S. C. 4 Inst. 127; see Co. Litt. 165. a. From this, it might be concluded that an office descends to the eldest sister only as soon as she is married. And in a late contest about the office of Great Chamberlain, which arose in consequence of the late Duke of Ancaster's leaving his two sisters co-heiresses, one of whom (the eldest) was married to Mr. Burrell (since created Lord Gwyder), the Attorney-General made a report, in conformity to the doctrine laid down by Lord Coke, as to the office of High Constable. But afterwards, when the case came before the House of Lords, the judges gave it as their opinion, "that the office belongs to both sisters; that the husband of the eldest is not of right to execute it; and that both sisters may execute it by deputy, to be appointed by them, such deputy not being of a degree inferior to a knight, and to be approved of by the King." And the Lords certified accordingly; Harg. n.; 8 Co. Litt. 165. a. (9.); 2 Bro. P. C. 146; Journ. Dom. Proc. 25th May, 1781; Parl. Reg. 1780, 1781, vol. 4.; H. Chit. Desc. 209.

† But from the moment that a payment of rent becomes due, it is then personal property; therefore, where the person entitled to a rent service outlives the day on which it becomes due, it will go to his executor or administrator; but if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion. Although rent must be demanded at sunset of the day on which it is payable, if the lessor intends to take advantage of a condition; yet rent is not due till the last minute of the natural day. In the case of leases made by tenants in fee, or under a power, if the lessor dies on the day of payment, but before midnight, the rent will go along with the land to the heir, or the person in remainder or reversion; because the lessee has, till the last instant, to pay his rent; consequently, the lessor dying before it was completely due, his personal representatives can make no title to it. But where a lease is made by a bare tenant for life, which determines at his death, there, if the person entitled to the rent lives to the beginning of the day on which it is payable, it will vest in his personal representative; 1 Saund. 287. n. 11; 1 P. Wms. 179; 3 Cru. Dig. 325.

tail, for life, or years; are assets for the payments of debts, and are governed by the same rules of descent as temporal inheritances, and have all other similar incidents belonging to them; 3 Cru. Dig. 61. 62; Co. L. 159; id. ib. 62. Seisin of tithes, which will enable the person taking by descent to convey the same to his own heirs, can only be acquired by actual receipt of tithes, as they issue out of the lands; for there is not any land itself of which he can obtain a seisin; H. Chit. Desc. 203.

2. *Doe, D. LUSHINGTON, v. THE BISHOP OF LANDAFF.* T. T. 1807. C. P. 2 N R. 491.

In this case it appeared that a rectory in Kent, formerly belonging to one of the dissolved monasteries, had been granted by Henry the Third to a layman, to be holden in fee by knight's service *in capite*. The Court held that the lands were descendible according to the custom of gavelkind, but that the tithes devolved according to the rules of the common law, and said: the law of gavelkind, unlike other customs, must have existed time out of mind; and is not good if it commenced only just before the reign of Richard the First. As it is an established notion of law, that a layman was incapable of having any tithes until the dissolution of the monasteries, and that, till that time, tithes could only belong to the church, it is impossible that there should be any ancient descent with respect to them. They could not descend from ancestor to heir, because they could not be in the hands of any private individual.

(H. WAYS.

It has been said, that a way cannot, like a right of common, be in gross, but must be claimed as appendant or appurtenant to a house; Yelv. 159. In such cases a seisin is acquired by the seisin of such house; H. Chitty's Desc. 206. But it seems that it may be *quasi* appendant to a house, and thus pass by a grant of the same; Cro. Jac. 190. And, if a right of way may thus be in gross, it is conceived that the owner must acquire that which is tantamount to a seisin; namely, he must exercise his right of way before he can transmit the same to his own heirs; H. Chit. Desc. 206.

VII. RELATIVE TO DESCENTS IN SOME SPECIAL CASES.

(A) OF THE CROWN.*

The crown is, says Sir W. Blackstone (1 Bl. Com. 191.) by common law and constitutional custom, hereditary in a manner peculiar to itself; and though the right of inheritance may from time to time be changed, or limited

* It has been said, that the king may purchase lands to him and his heirs; and that such lands, as also lands descending to him from an ancestor, shall go to his heir, in case he is removed from the royal state; Plow. 234. And it is laid down by Lord Hale, that "purchases made before accession to the crown, or descents from collateral ancestors, after descent of the crown, vest in a natural capacity; and, therefore, in the re-ademption of the crown by Edward the Fourth, there was a special act to give to the king all the possessions of Henry the Sixth. But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without livery; and the grants of the crown will not be affected by non-age *et similiter*; Co. L. 15. b. n. 4. Lord Coke says, that all the lands and possessions whereof the king is seised *jure corona*, shall *secundum jus corona* attend upon the crown; and, therefore, to whomsoever the crown descends, those lands and possessions descend also: and that the lands and the crown are *concomitantia*; Co. L. 15. b; 7 Co. 10. 12.; 9 Co. 123. Therefore, if the king purchase lands to him and his heirs, he is seised thereof *jure corona*; *a fortiori* when he purchases lands to him, his heirs and successors; Co. L. 16. a. So if lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure corona*, therefore it shall attend the crown, and consequently go to the eldest; Plow. 205. a; Co. L. 15. b. And where a man, who is king by descent of the part of his mother; Co. L. 15. b; purchases lands to him and his heirs, and dies without issue, this land shall descend to the heir of the part of the mother; though in the case of a subject, the heir of the part of the father should have them. So, if an usurper purchase lands, and the right heir resume the crown, he shall have the purchase; and *e converso*, an usurper shall have the purchases made by a rightful king; so long as he has the crown; Ib. n. 4. So that the king can have nothing in his natural capacity unless in right of his duchy, or an estate tail by the statute *De Donis*; and duchy lands would now be in the crown (7 Mod. 78.) if not kept separate by

- [67] by act of parliament, as was done at the Revolution in 1688, still, under such limitations, the crown continues hereditary. This rule is admirably illustrated by Sir W. Blackstone, by an Historical Sketch of the Titles of the Kings of England. The rules of inheritance which govern the descent of private estates, are in general, equally applicable to the descent of the crown; 5 Bac. Abr. tit. Prerog. A. 1. Wood. V. L. 69; 1 Blac. Com. 193. The few differences which exist were introduced on grounds of political necessity. The general doctrine, that all the daughters of the father, who died seised, are entitled to his estate on failure of a male heir; see Litt. sect. 241; does not apply to the descent of the crown: so that the eldest daughter of the last king is, under such circumstances, exclusive heiress to the throne; Co. Litt. 15. b; 7 Co. 12. b; 1 Blac. Com. 194; 1 Wood 69. So the rule of *possessio fratris* does not hold on the descent of the crown; nor is half-blood an impediment in such case. Therefore, if the king has issue a son and a daughter by one venter, and a son by another venter, and die, on the death of the eldest son without issue, the younger brother is entitled to the crown, to the exclusion of the daughter; Plowd. 245; 4 Inst. 206; Co. Litt. 15. b; 1 Woodn. 69. Even the doctrine which anciently prevailed in law of descents, that when the eldest son was already provided for, the next brother should take the rest of their father's inheritance, was never adopted as a rule of public succession; 1 Bla. Com. 200; Chitty on the Prerogatives of the Crown, 9.

- [68] (B) OF HEIR LOOMS.

Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor.*

VIII. RELATIVE TO HOW A DESCENT MAY BE QUALIFIED OR DESTROYED.

(B) BY ACT OF THE ANCESTOR.

the statute 1 H. 4. which provides that when the duchy lands come to the king, they shall not be under such government and regulations as the demesne and possessions belonging to the crown; for the act says, *quod taliter et tali modo et per tales officiales et ministros gubernentur, ac si ad culmen dignitatis regie assumpti minime fuissent*; Raym. 90. The treasure, and other valuable chattels, are so necessary and incident to the crown, that in case the king dies, they shall go with the crown to the successor, and not to the executors; 11 Co. 92; 2 Roll. Abr. 211. The ancient jewels of the crown also are heir-looms, and shall descend to the successor, and are not devisable by testament; Co. L. 18. b. But it hath been said, that the king may dispose of them in his life-time by letters patent; Cro. Car. 344; H. Chit. Desc. 266.

* They are generally such things as cannot be taken away without damaging or dismembering the freehold; otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor; Co. Litt. 388. But deer in a park, fish in a pond, doves in a dove-house, &c., though in themselves personal chattels, yet they are so annexed to, and so necessary to the well being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase; Ibid. 8. For this reason also the ancient jewels of the Crown are held to be heir looms; Ibid. 18; for they are necessary to maintain the state, and support the dignity of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir looms, and shall not go to the executor; Bro. Abr. tit. Chattels, 18. By special custom also, in some places, carriages, utensils, and other household implements, may be heir-looms; Co. Litt. 18. 185; but such custom must be strictly proved. On the other hand, by almost general custom, whatsoever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, *quod ab ædibus non facile revellitur*. [Spelm. Gloss. 277.] is become a member of the inheritance, and shall thereupon pass to the heir; as chimneyspieces, pumps, old fixed or dormant tables, benches, and the like; 12 Mod. 520. Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the personal and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet the parson or any other cannot take them away or deface them, but is liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir; 3 Inst. 202; 12 Rep. 105.

1st. *By a devise.*

1. In debt against the heir, the defendant pleaded that he had but the third part of twenty acres by descent. The issue was, whether he had not the whole. It was found that the obligor, his father, devised the whole to his wife, until the defendant, his son and heir, should come unto the full age of 24 years, and from thenceforth to him and his heirs. Judgment was given for the plaintiff, for the fee-simple descended to the son;* *Dyer*, 124. pl. 28; see *Cro. Eliz.* 833; 1 *Roll. Abr.* 626; *Vaugh.* 271.

Where a testator devises to the heir at law, the same as the law would have given him iode

pendent of the will, the heir shall take by descent, and not under the will.†

2. *NOTTINGHAM V. JENNINGS*. T. T. 1700. K. B. 1 *Salk.* 233; S. C. 1 *Ld. Raym.* 568; S. C. 1 *Com.* 82.

The facts of this case were these: H. had three sons, A., B. & C., and devised his lands to B., his second son, after the death of his wife, to hold to him and his heirs for ever; and, for want of such heirs, then to his own right heirs. H. died, and B. entered and died without issue, leaving the oldest son.

Where, therefore, the limitation in fee to an heir by devise was after an estate tail, the devise was held void in point of limitation, and the heir was decreed to take by descent.‡

Et per Cur. The second son had only an estate tail, and the eldest shall take by descent, and not by the will; and so the devise over is void in point of limitation; for his intent was, that the land should descend from himself, and not from his son B. If the devise over had been to a stranger, it had been void, and B. had taken a fee; but here is only an estate tail, and the words

* Again (*vide* 2 *Rep.* 512. *Cholmely's case*, *et* 1 *Ld. Raym.* 522, 527; *Salk.* 283; *Comyns*, 62) if there be a tenant for life, remainder to B., his son in tail male, remainder to A. and the heirs male of his body, remainder to A. in fee; and A. having another son, C., devise his remainder, after the death of B., without issue, to C., his second son in tail male; this devise can never take effect, and therefore is void; because the estate tail in the father will descend at the same time, and take place of the estate tail devised, and then the devisee will take the old entail by descent, which will exclude the new estate limited by the will, because the will gives no more nor otherwise than the devisee would have taken by the entail, as is apparent by the comparison of the descents; for the estate tail devised expires *exquis passibus* with the estate tail in A. the father. But (*vide* *Yelv.* 149. *Moor.* 344) if in the preceding case, the reversion expectant upon the determination of the estates tail had been in A., the donor, instead of a remainder, the devise to C. his second son in tail had been good, though it could never by any possibility have taken effect in possession; because, in that case, tenant in tail would have held of him in reversion, and be of the chief lord, and, consequently, the devisee of the reversioner would have been entitled by the devise to the services which tenant in tail is to perform during the continuance of the estate tail, and which would otherwise descend to the heir general of the testator; so that the effect of the will would then be, that B. would from thenceforth hold of C. instead of holding of A., and C. would hold of the chief lord, and the lord should avow upon C. *unde et forma predictis*. The will would thus take effect by creating a seignory and tenancy, though it could never take effect in possession.

† This rule, that the devisee shall be in of the elder title, viz. by descent, has been said by some to have been adopted in favour of the heir, that he might be in of his better title, and thereby toll an entry, or have a warranty. But, if that were the case, he would be entitled to an election to take either under the will or under the devise, as might be most to his advantage; but that he cannot do; *vide* *Styles*, 148. The rule seems rather to have been adopted in favour of third persons, viz. of the lord, for the preservation of the tenure (which was a valuable thing before the statute of *Marlbridge*), and of creditors for the preservation of their debts.

A curious consequence follows from this rule of law, as to the descent to the heir, in case the heir, to whom the devise is made, *qua* heir, be a daughter, and there is a posthumous son born; for, in such case, the son shall have the land, and not the daughter; because, it being the intent of the father to give his lands in like manner as they would have gone at common law, as at common law the birth of the son, had the lands descended, would have divested the lands out of the daughter, so it shall also notwithstanding the devise; *vide* 5 *E.* 4 b.

‡ And the alteration of an estate in reversion that the law casts on the heir into an estate in remainder, which is given by a devise, is not a difference concerning the estate, in point of estate, between what the law directs and what the devise directs; in such case, all the difference is, in the manner how, and time when, the heir shall come to the estate. And, therefore, if a man devise land to his wife for life, remainder to J. S. (he being the donor's next heir) in fee, this devise is void, and he shall be in, after the death of his wife, by descent, which is the more worthy and elder title, and not by purchase by way of remainder; *Sty.* 148; 1 *Roll. Abr.* 626. D; 2 *Leon.* 101; 8 *id.* 118; *Str.* 491; *Fearn. Posth. Works*, 379.

[70] "heirs" can import nothing more than issue, for B. could not die without heirs, living heirs of the father.*

3. *HURST V. THE EARL OF WINCHELSEA*. M. T. 1759, K. B. 2 Burr. 880; S. C. 1 Bl. Rep. 187.

Nor is this rule confined to devises under the statute of wills; it equally applies to wills made in pursuance of powers.†

[71]

Charging an estate devised to the heir at law, with money to be paid to younger children;

A. being seised in fee, on her marriage the lands in question were settled to the use of A. for life, remainder (subject to a certain term) to J. H. son of A. for life, remainder to trustees to preserve, remainder to the first and other sons of J. H. in tail male, remainder to such uses as A. should by deed or will appoint; and, in default of appointment, to the use of A., her heirs and assigns for ever. A., by will, during the coverture, appointed the lands to J. H., her son, (who was her heir at law) in fee, subject to the payment of her debts. Upon the death of J. H., who survived his mother, his heirs *ex-parte paterna* contended that he was a purchaser, and his heirs *ex-parte materna* that he was in by descent. Lord Keeper Henley sent a case with this question to the Court of K. B., and that court, consisting of Lord Mansfield and Dennison, Forter, and Wilmot, Justices, certified that J. H. took the estate by descent. The Lord Keeper decreed accordingly; but an appeal was brought in the House of Lords, which was afterwards compromised.

4. *CLARKE V. SMITH*. E. T. 1700 C. P. 1 Com. 72; S. C. 1 Salk. 241.

A. B., seised in fee, devised lands to his wife for life, and after her decease to his next heir at law, and to his or her heirs, provided such heir should pay 100*l.* to such person or persons as his wife, by will or other legal writing, should appoint, and that his land should stand charged with the said 100*l.* The deviser died, leaving a daughter, who had one son, and died. The wife died, without making any appointment to whom the 100*l.* should be paid. The

* And a devise of an estate for life to the heir at law will, if no further disposition be made thereof, be void, because the fee simple which descends upon him drowns the particular estate for life; 3 Leon. 26.

† For if lands come to a man by descent from his mother, no heir, it has been already noticed *ante*, p. 47. on the part of his father, shall ever be heir of those lands, but his heirs on the part of his mother shall inherit: in the same manner as the heirs of the mother, on the part of the mother, shall not succeed to an estate actually descended to the son from his father.

‡ Upon this case, the learned author on the Treatise of Powers. Sugd. Pow. 4th edit. 331. has made the following observations:—"This, it must be allowed, was a very extraordinary decision. It may be right to hold that the instrument shall operate as a proper will, as to the words and general effect of it: but upon what solid principle a man can be held to take that by descent, which never vested, or had a chance of vesting, in his ancestor, it is not easy to conceive. The grounds of the determination were quite foreign to the question. The principle of the decision cannot even be supported by any plausible fiction, nor does policy require the adoption of it; for, in the general run of cases, it must be wholly immaterial whether the appointee take by descent or purchase. It should be observed, that, in the case referred to, the power was reserved to the person who made the settlement, and who was at that time seised in fee. It may not, therefore, be deemed a general authority that, in every case of a beneficial power, the heir of the donee, being the appointee, take by descent, although the donee himself never had any interest in the estate."

But Mr. Sugden must not be understood to mean, as his language would seem to import, that the donee had not an interest in the land, which would have descended to the heir, in default of appointment, for the fee was clearly limited to her; but his meaning probably was, that the donee was not ancestor *quoad* the appointed fee. It seems to be impossible, indeed, without confounding all our ideas in regard to the essential discriminating qualities of a power and an ownership, to hold that a testamentary appointment to the heir of the donee is void, as in the case of a devise. In the instance of a devise, the heir has an antecedent title under the ownership of his ancestor: but in the case of an appointment his title as heir is ulterior to the appointment; for, as appointee, he claims immediately under the instrument creating the power, the limitation being read as if inserted in that instrument. The fact, that the power and ownership may subsist unconfounded in the same person, seems to involve the admission that the titles derived from these different sources may be subjects of distinct contemplation, and cannot be so blended as to produce by their joint result, an effect incident to simple ownership. The point was lately raised in the case of *Langley v. Sneyd*, 7 J. B. Moore, 165; S. C. 3 Bro. and Bin. 243; and 1 Sim. and Stu. 45; but the opinion of the Court of Common Pleas, to which a case from Chancery was sent, being that the will of the testatrix (the determination of whose coverture had enabled her to dispense with the power, if she pleased) did not operate as an appointment, but took effect out of her ownership, it was not necessary to decide the question.

son of the daughter entered, and died without issue; and, on a dispute between the heir maternal of the son and the heir paternal, the question was, whether the son took by purchase under the will, or by descent? And it was resolved by the whole Court, that the heir took by descent, and not by the will; for it would be mischievous, if every little legacy should alter the course of descent, and thereupon the heir might plead to the obligation of his ancestor *reins per descent*. See Cro. Eliz. 833. 919; Moore, 644; 2 Atk. 290; 7 Ves. 323.

5. ALLAN v. HEBER. T. T. 1748. C. P. 2 Stra. 1270; S. C. 1 Bl. Rep. 22.

On *reins per descent* pleaded, it appeared that the ancestor devised the lands to the heir for payments of debts. The Court held that, notwithstanding they were a charge on the land, yet the heir was in by descent; for the tenure was not altered.

6. EMERSON v. INCHBIRD. T. T. 1701. Sittings at Guildhall. 1 Lord Raym. 728.

The father devised hereditaments to his son and heir in fee, but chargeable with debts, and an annuity or rent charge payable to his widow. It was held by Holt, C. J., that the hereditaments descended to the son and were assets, because whenever the devise conveys the same estate as the law would make by descent, but charges it with incumbrances, the heir takes by descent, and not by purchase.

7. HEDGER v. ROWE. T. T. 1683. C. P. 3 Lev. 127.

A man seized of lands, a *parte materna* devised them to his executors for payment of his debts for 16 years, and afterwards to one that was his heir a *parte materna*; the question was, whether he took by descent, or by purchase, under the will; and Charlton, before whom the case was made, inclined that he took by purchase, that being the best for him; because, then the heir a *parte materna* might inherit before the heir a *parte materna*, and so both heirs be inheritable. But Pemberton, Wyndham, and Levinz, held that the devise was void, as he should take by descent, it being no more than if the devisor had made a lease for 16 years, and then devised the reversion to his heirs; and they said, the descent from him to the heir a *parte materna* or *materna* was only a consequence arising out of the nature of the estate.

8. BRITAM v. CHARNOCK. H. T. 1676. K. B. 2 Mod. 286; S. C. 1 Freem. 248.

On *reins per descent* pleaded to debt on bond against defendant as heir, a special verdict was found, from which the facts appeared as follows: the father was seized of a messuage and three acres of land in fee, and devised the same to his eldest son (the defendant) and his heirs, within four years after his decease, provided the son paid 20 pounds to the executrix, towards the payment of the testator's debts, &c. The father died; the son paid the 20 pounds. The question was, if this messuage, &c. was assets in the hands of the defendant. Per North, C. J. and Atkins, J. Where the heir takes by a will with a charge, as in this case, he doth not take by descent, but by purchase, and therefore this is no assets.

where by way of charge; viz. Gilpin's case, Cro. Car. 161., and the case here abridged; 9. CLARKE v. SMITH. E. T. 1700. C. P. 1 Com. 72; S. C. 1 Salk. 241.

S. P. CHAPLIN v. LEROUX. E. T. 1816. K. B. 5 M. & S. 14.

Per Cur. (Gilpin's case, 1 Cro. 161.) that if a man devises land to his heir in fee upon a condition, his heir shall take by purchase; and the opinion (2 Mod. Rep.) by two judges, that if a man devises land to his heir, paying 20l. the heir shall take by the will, and not by descent, are unintelligible and ill-reported.

10. CHAPLIN v. LEROUX. E. T. 1816. K. B. 5 M. & S. 14.

A testator devised his lands to his widow for her life or widowhood, remainder to his son (who was his heir at law), and he charged the lands with 1500l. to be paid within one year after a certain event, and in default of payment, he devised the lands to G. T., his heirs, &c. to raise the money by sale or mortgaging an exe-

Or for pay
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debts;

With an an
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rent charge
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And the
law will be
the same,
although
from the cir
cumstances
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heir at law
to take by
the devise,
and not by
descent.

There are,
however,
two cases
which seem
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of condi
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But such
cases have
been since
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And it has
been held
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utory de
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not break
the descent.

gage, and subject to this and other charges, he devised the lands to his said son, his heirs, executors, administrators, and assigns; it was contended that the son took only a bare fee, or a fee determinable on the event of the incumbrances being unsatisfied, and consequently a different estate from that which he would have taken as heir both in quantity and quality; but the Court held, that, whether it was executory devise, or not, (alluding, probably, to the argument, that the trustee took only a power of sale,) the heir took by descent.

[73]

Where,
therefore,
there was a
devise to
the heir at
law, with
an executory
devise over
in case he
did not
attain 21
years of
age, the
Court held
that he took
by descent
and not by
purchase.

11. *DOE, D. PRATT, V. TIMINS.* E. T. 1818. K. B. 1 B. & A. 530.

A testator devised his lands subject as to part, to certain annuities to W. J. or his assigns, in trust for the testator's grandson, W. R. J., (who was his heir at law), till the age of 21, and then the grandson to be put in possession of the estates, and to be at his disposal; but, if he should not arrive to 21 years, then over to the other persons, "in the same manner" as to the grandson. There was also a power of distress and sale, given to an accountant in default of payment. It was held, that this power and the executory devise did not break the descent. Bayley, J., observed that, where the estate is given to the heir at law, expressly subject to an annuity, or charges, it does not break the descent; and *Haynsworth v. Pretty* (Cro. Eliz. 833.) is a strong authority to show that an executory devise over has not this effect. There is no difference, whether there be an express devise to the heir at law or not. Suppose the whole will here had consisted of the alternate limitation to the executory devisees, that would have been an executory devise to take effect on the grandson's not attaining 21; in the interim the estate would have descended on the heir at law. I can see no reason, therefore, why the heir at law here should not take by descent; and there are strong reasons why he should. The case of *Scott v. Scott*, (Ambl. 383; S. C. 1 Eden. 458), has received a sufficient answer in argument at the bar.*

12. *REDDING V. ROYSTON.* H. T. 1792. K. B. 1 Com. 123; S. C. 1 Salk. 242, S. C. 2 Id. Raym. 829.

However,
if any other
estate in
quantity or
quality is
devised
than would
have come
to the heir
by descent,
the heir
will take by
purchase.†

In this case it appeared that A. B. had two daughters, one of which had issue a son, to whom and his heirs for ever the testator's land was devised. And the question was, whether the son should take all by devise, or the one moiety by descent, and the other moiety by devise; for then, as to that moiety he took by descent, his aunt, the other daughter, would be coparcener with him. And it was argued, that where two titles concur, the elder shall be preferred; and that as to one moiety, which the grandson had by the devise, he had the same estate in it, and no other, by the devise than he would have had without it; and therefore, since the devise worked no alteration in point of estate as to that, the grandson should take it in *potiori jure*, which was by descent.—But it was resolved by the Court that the grandson should take all by the devise, and could take a moiety by the descent as heir, and a moiety by the devise.

* In this case, Lord Northington decided, that a devise by a man to his eldest son in fee, with a limitation over, on his dying under 21, without issue, gave him a different estate from that which he would have taken by descent.

It had been contended, that it was at variance with all the other cases on the subject, and had not met with the general approbation of the profession; for Mr Serjeant Hill, in a note to his *Ambler*, states, that the judgment is right, but that the reasons given for it are wrong; and then cites authorities, to show that an executory devise over does not break the descent.

† If, therefore, a man make a devise in tail to his heir at law, it is good: for the law would, by its operation on a descent, give him an estate pure and absolute, which the devise does not; Amb. 383. So, if an estate is devised by a man to his two daughters who would take by descent as coparceners, so that they are joint-tenants under the devise, such devise would be good; Cro. Eliz. 431; 1 Leon. 112; Gouldst. 141. pl. 58; 3 Lev. 127. 128.

So, if a man have land in borough English and also guildable land, and devise all his lands to his two sons, and die, they shall take jointly, and the younger shall not have a distinct moiety in borough English, nor the elder in the guildable land, but they are both joint tenants; Owen. 66. And the law would be the same if one, having several sons, and

2ndly By a feoffment and re-enfeoffment.

DOE, D. BALCH, v. PUTT. T. T. 1768. C. P. cited 3 Doug. 773.

This was an action of ejectment. A special verdict had been found, which stated, that M. M. being seised in fee of an estate, of which the premises in question were an undivided moiety, on her marriage, conveyed to trustees and their heirs, to the use of them and their heirs, upon trust, to permit her to receive the rents and profits to her separate use during life, and to grant and convey the estate, or any part thereof, to the use of such person or persons, in fee or otherwise, as she, whether married or sole, by deed or will, should appoint; and, for want of such appointment, to the use of the husband for life, remainder to her first and other sons in tail, remainder to her daughter in tail, as tenants in common, remainder to her right heirs; that the marriage took effect, and she died, leaving her husband and an only daughter, an infant; that the husband afterwards died, and then the daughter died, being still under age, and without issue; that the lessor of the plaintiff and one N. were the heirs at law of the daughter, *ex parte materna*, (being the sons of two deceased sisters of the mother,) and that on the daughter's death they entered on the estate; that the lessor of the plaintiff and the surviving trustee, by lease and release reciting as above, and that N. had, for a certain sum, agreed to purchase the lessor of the plaintiff's moiety, had, in consideration of the stipulated price, conveyed that moiety to N. in fee; that on the same day, by lease and release also reciting as above, the trustee had conveyed the other moiety in fee to N.; that N. died seised of all the estate, leaving the lessor of the plaintiff his heir at law *ex parte materna*, and the defendants his heirs at law *ex parte paterna*. The question on the special verdict was, whether the moiety conveyed by the surviving trustee alone to N., (for which moiety only the action was brought,) belonged to the lessor of the plaintiff or to the defendants. The Court unanimously decided in favour of the latter, though it was contended the legal estate should follow the old use which had come to N. by descent *ex parte materna*.

[74]
If tenants *ex parte materna* make a feoffment to the use of his maternal heirs and the feoffee re-enfeoff him *ex parte* those heirs, yet the re-enfeoffment shall enure to the paternal heirs.*

[75]

3dly. By fine or recovery.

ROE, D. CROW, v. BALDIVERE. H. T. 1793. K. B. 5 T. R. 104.

A. being a tenant in tail by purchase under his mother's marriage settlement, with remainder to B. in tail, with remainder to himself in fee, by descent, from his mother, suffered a recovery, and declared the use to himself in fee, and afterwards died seised, intestate, and without issue. The Court was of opinion that the lessor of the plaintiff who claimed as heir to A., *ex parte materna*, being seised of gavel kind lands, devised them to his sons, who were heirs by the custom; for in such case they would be joint tenants by the devise, and the survivor should have the whole; whereas if the lands had descended, they would have been in the nature of parceners; Bear's case, 1 Leon. 112. 113. Mr. Fearn's, in one of his opinions, says, (Fearn's Opi. 128. see 6 Cru. Dig. 161.) that a devise to the heir and another, as tenants in common, will not prevent the heir taking his moiety by descent; for, suppose a testator devises a moiety, or any other undivided share, of his real estate to a stranger, making no disposition of all the remaining undivided share, such remaining share would, of course, descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear, therefore, that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate of which his ancestor was solely seised; and it appeared to be immaterial whether the share he so takes is expressly devised to him or left unnoticed by the will, for if expressly devised he takes it in common, and if not noticed he takes it in the same manner; and a devise to two or more, as tenants in common, is in effect a devise of one undivided part to one, and of another part to another. So that under such a devise to an heir and a stranger, as tenants in common, the heir takes as if one undivided moiety was devised to a stranger, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and, therefore, the same estate being devised to him in such residue, as he would have taken by descent, the general rule respecting devises to an heir extends to it.

* On the same principle it has been determined, that a conditional surrender in fee by a person seised of a copyhold estate, *ex parte materna*, and admittance of the mortgagee, will break the line of descent, like a feoffment and re-enfeoffment, and that the estate will go to the heir *ex parte paterna*; Doe. d. Harman, v. Morgan, abridged *ante*, vol. vi. tit. Copyhold. p. 353.

The descent of an estate *ex parte materna* may in some cases be al

tered by a *terma*, was entitled to the estate; because A. being tenant in tail by purchase, and the recovery merely expanding and enlarging that entail into a fee, the fee must be considered as depending on the same title; and the recovery had destroyed both the remainder to B. and the maternal reversion.

(B) BY OPERATION OF LAW.

[76]

The descent of lands is in some cases affected by the consequences of an attainder. One of the consequences of the attainder is the corruption of blood of the person attainted, which formerly extended to all kinds of attainder; but the statute 54 G. 3. c. 45. has abolished both the corruption of blood and the forfeiture of lands after death in every case, except treason, petit treason, and murder, which remain as at common law. So that now, on attainder of ordinary felony, the criminal only forfeits his goods and chattels, and the profits of the land during life, while his real estate comes in the ordinary channel of descent to his heir, who is thus also restored to a full capacity to inherit; see 1 Ch. C. L. 735. The effect of this corruption of blood, which takes place both upwards and downwards, is, that an attainted person can neither inherit lands or hereditaments from his ancestor, nor retain those of which he is already in possession, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the King's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, in all cases where they are obliged to derive a title through him to a more remote ancestor; see Bl. C. 251; 4 id. 388; Co. L. 8. a., 292 291; 1 Hale, 356; Bac. Abr. Forfeiture, G. Burn, J., Forfeiture, III. But it is a general rule that, where there is no necessity to name or derive title through a person attainted in making out a claim by descent, the corruption of the blood by the attainer of such person will not impede or vitiate the same, though the ancestor to whom the pedigree is to be traced be ever so remote. Estates tail are not affected by the corruption of blood of any lineal or collateral ancestor; H. Chit. Desc. p. 350.

(C) IN CONSEQUENCE OF THE ACTS OF THIRD PARTIES.

A descent may be affected by the acts of third parties, amounting to an ouster, or amotion of possession. By the ouster of the owner of an estate, the actual seisin is in the person committing the injury; and the disseisee, or person ousted, has no more than a right which will be transmitted to his heirs in a regular course of descent, in the same manner as if clothed with the possession (Watk. Desc. 823); but with this exception, that not being attended by the actual seisin or possession, it would not, after the death of the disseisee, and a descent to his heir, be subject to the rule of *possessio fratris*; for if one is disseised and dies, and the right descends to his heir, and such heir dies also, leaving a brother of the half blood, and a sister of the whole blood, and without having ever recovered the possession, the brother of the half blood would succeed to the inheritance, and not the sister of the whole. And here it may be observed that such right is not capable of being transferred, or the interest of the owner so far exercised over the same, as to enable him to become an ancestor by any of the modes before specified in the instance of estates in possession; see 1 Cru. D 262. For such heir having had only a right, and no actual possession or seisin, he could not have turned the descent; so that, on his death, the person should succeed who could make himself heir,

* In the case of a tenant in tail by descent, if it be desirable to destroy the descent *ex parte materna*, and make the estate descendible among the heirs general, a conveyance should be made to trustees after the recovery has been perfected, and a re-conveyance taken from them to the uses required, with the ultimate use to the tenant in tail in fee, by which means the ultimate fee will, as in the case of a feoffment and re-ensfeoffment by a tenant in fee *ex parte materna*, have been acquired by purchase, and will then be descendible to the heirs on the father's side; see Cov. on Rec. 311, 312. Where a man, tenant in tail by purchase, with the reversion in fee *ex parte materna*, levies a fine with proclamations, the estate tail becomes extinguished, and the reversion then comes into possession; and this being the old fee, will consequently descend to the heir on the mother's side, and not to the heirs general; the only effect of the fine, in such case, being to bring the estate into possession; 1 Craze, 274; Carth. 257. 261; Rice v. Langford, Carth. 140; Dyer, 311. pl. 84; Watk. Desc. 292.

not to such heir of the disseisee, but to the disseisee himself, he being the person who was last actually seised. For though the disseisin deprived him of the actual possession or seisin, yet it only related to the time of such disseisin made, and would not have relation to any prior event; so that, as he was once actually seised, that actual seisin shall not be in this case *ab initio* defeated; but the pedigree shall run, and the claim be made, from him, as being so seised; see Wat. Desc. 83; H. Chit. Desc. 348. By the ouster, the estate of the person divested of the possession, and of his descendants or heirs, is reduced to a right of possession, by virtue of which he may enter at any time on the person committing the ouster; see 3 Bla. Com. 175. But if such person dies, the estate descends to his heir, and the right of possession becomes two-fold; the actual right of possession is in the disseisee or his representatives, and the apparent right of possession is in the heir of the disseisor; and this right of entry is tolled, that is, taken away, by the descent, except in certain cases on account of the disabilities of the persons entitled to enter; and by such descent the interest of the disseisee is reduced to a right of action; 3 Bla. C. 377; H. Chit. Desc. 349; Watk. on Descents, p. 83.

[77]

Deserter. See tits *Martial, Court of; Soldiers.*

Desire, Words of. See tit. *Devise.*

Destroying, or Concealing, Instruments. See tits. *Bills and Notes; Bonds; Coin; Deeds.*

Detainer.

I. WHEN IN CUSTODY ON CIVIL PROCESS, p. 77.

II. CRIMINAL PROCESS, p. 79.

I. WHEN IN CUSTODY ON CIVIL PROCESS.

1. WILKINSON v. JACQUES. T. T. 1789. K. B. 3 T. R. 392.

The defendant had escaped; and the creditor having recovered against the warden and the defendant having afterwards satisfied the warden, and obtained a release, still continued to reside in the Fleet, going in and out whenever he pleased. In the meantime, the plaintiff lodged a detainer against him; and, the warden having refused to permit him to go at large, he obtained a rule to show cause why he should not be discharged out of custody.

The Court said, there was a detainer by another creditor, who found the defendant in the Fleet, to whom it was indifferent on what account, or by what means, he was there. If he were, in fact, within the walls of the prison at the time, that is sufficient; for, then he would not be arrested in the ordinary manner, but could only be detained.

2. QUIN V. REYNOLDS. T. T. 1814. K. B. 3 M. & S. 144.

A. arrested B.; B. put in bail above, and, after the bail had justified, received a rule of court for his discharge from custody. In the interim between the justification and receipt of the order, A. lodged a fresh detainer against B. with the officer in charge of him. It was urged, that the defendant was constructively liberated from custody as soon as his bail had justified, and was, consequently, not liable to this detainer, in conformity with a rule of court, by which it was ordered that a defendant, having been lawfully delivered from arrest shall not again be arrested at the suit of the same plaintiff.

Per Cur. After the bail have justified, it is the invariable practice to serve a rule for this allowance on the plaintiff; and then the party obtains a rule, and is entitled to be discharged on filing common bail. As the defendant has

* If, whilst the defendant is in custody, any other bailable writ be lodged with the sheriff, at the suit of the same or of any other plaintiff, the officer in whose custody he is, is bound at his peril to detain him, until regularly discharged from this second writ; it is the officer's duty, therefore, to search the sheriff's office, to see if there be any detainers lodged there against a person in his custody before he discharges him; see Arch. Prac. K. B. 73. A detainer is in fact a new imprisonment; see 1 Rol. 241.

So a party wilfully remained within the walls of the prison, the detainer must be viewed as lawful. See 2 B. & P. 341; 1 T. R. 591; 3 id. 392; 4 id. 493.

3. GALLAWAY v. BOND. M. T. 1815. K. B. MSS. n. 1 Chit. Rep. 580. S. P. HOWSON v. WALKER. T. T. 1771. C. P. 2 Pl. 823. S. P. DAVIES v. CHIPPENDALE. M. T. 1800. C. P. 2 B. & P. 282.

Per Cur. A defendant who has been wrongfully arrested is not entitled to be discharged out of the custody, from subsequent detainers, where there has been no collusion between the creditors at whose suit the defendant was detained and the person by whom he was originally arrested; and it appearing that the detainers were ignorant of the circumstances under which the original arrest took place. The latter found the defendant in custody, and treated him, as they had a right to do, as being properly in custody. We must, therefore, discharge the rule which has been obtained, to liberate the defendant from the present detainer, and without costs; as, in order to fix the plaintiff with the costs, it ought to have been shown that he had a share in the illegal proceedings. See 2 Burr. 1048.

4. BARKLEY v. FABER. T. T. 1819. K. B. 1 Chit. Rep. 579; S. C. 2 B. & A. 743.

Although the detainer was lodged against the defendant, pending a rule for his charging him out of custody; It appeared that the defendant had been originally arrested by A. B.; that a rule had been obtained by him to be discharged out of custody, on the ground of a defect in the affidavit to hold to bail; and that a detainer had been lodged against him by the present plaintiff, pending the discussion of that rule, which had been subsequently made absolute. A rule had been obtained to discharge the defendant from such detainer; but it being sworn that the detainer was without any collusion or fraud between the present and the original plaintiff, and that the plaintiff and his attorney were not cognizant of the fact of the defendant being in custody until they saw an account of the former motion in the newspapers, the Court discharged the present rule; observing, that if they were to give a contrary decision, a person under an arrest at the suit of one person would be privileged from all other process during such imprisonment, which would be productive of great inconvenience and suspension of justice.—Rule discharged.

But where the attorney

[79]

ney who lodged the detainer

knew that the defendant was

privileged from being

held to bail, on the

ground of his being in

attendance on an arbitra-

tion under a rule of court, and

that there fore the original arrest

was illegal, the Court allowed

common bail to be

filed, Though in general the

Court will not discharge a defendant from a detainer on motion.

5. SPENCE v. STUART. M. T. 1802. K. B. 3 East, 89.

It appeared that the plaintiff's attorney, by whom a detainer had been lodged against the present defendant, had been present at a reference at which the defendant was attending to be examined under a rule of court, and was the attorney for the plaintiff in the cause which had been referred. It was sworn that he knew nothing of the sheriff's officer being about the house at the time of the defendant's being examined before the arbitrators (as the fact was, nor was concerned in the defendant's arrest in the first instance; but that, having been informed by his client, at whose suit the detainer was lodged, of the arrest, which took place on the morning after the defendant had been examined, he had in consequence lodged a detainer against the defendant in the course of the same morning. So that it appeared that the plaintiff in the second action, and his attorney, had not been instrumental in procuring the first arrest, but only lodged a detainer against the defendant afterwards. But the Court said, that as the plaintiff's attorney was cognizant of the occasion on which the defendant was at the place where he was arrested, the rule to cancel the bail bond on filing common bail must be made absolute, with costs.

6. QUIN v. REYNOLDS. T. T. 1814. K. B. 3 M & S 144.

It appeared that after the justification of bail the defendant, who had been arrested by the plaintiff, obtained a rule of Court for his discharge, when he was informed that a detainer, at the suit of the plaintiff, had been lodged against him. It was sworn that the sum, for which such detainer was lodged, was due at the time of the first arrest; from which it was contended, that the detainer was a second arrest for the same cause.

Per Cur. We cannot decide this question upon affidavits; an action must be brought for a malicious holding to bail.

II. WHEN IN CUSTODY ON CRIMINAL PROCESS.

1. *D. INTREE V. JUSTICE*. H. T. 1735. K. B. Ca. Temp. Hard. 190.

Defendant being in custody of the sheriff of M., upon a charge of felony, application was made for leave to charge him with mesne process. The Court granted the rule. A person in custody for felony may be charged with civil process

2. *BASKET V. RAYNER*. M. T. 1735. K. B. Ca. Temp. Hard. 170.

The plaintiff obtained an injunction in Chancery against the defendant for printing Bibles, who was then in contempt on the said injunction, and a prisoner in the King's Bench for a libel. The plaintiff moved for liberty to charge him with an attachment. *Lord Hardwicke* — To charge a person who is in custody here on a criminal prosecution with civil process, is a motion of course and a judge may grant it at his chambers. On motion in court, or to a judge at chambers. [80]

Determination of Suit. See tits. *Malicious Arrest; Malicious Prosecution*.

Detinet See tits. *Debt; Detinue*.

Detinue, Action of.

I. RELATIVE TO THE GENERAL NATURE OF, p. 80.

II. RELATIVE TO WHEN MAINTAINABLE, p. 81.

III. RELATIVE TO BY, AND AGAINST WHOM, MAINTAINABLE, p. 81.

IV. RELATIVE TO THE AFFIDAVIT TO HOLD TO BAIL, p. 82.

V. RELATIVE TO THE PLEADINGS.

(A) DECLARATION, p. 83.

(B) PLEAS, p. 84.

VI. RELATIVE TO THE EVIDENCE, p. 85.

VII. RELATIVE TO THE VERDICT, JUDGMENT AND COSTS, p. 85.

VIII. RELATIVE TO THE EXECUTION, p. 85.

I. RELATIVE TO THE GENERAL NATURE OF.

An action of detinue is the proper form to be adopted for the recovery of a personal chattel, and at the same time damages accruing to the plaintiff from its detention, especially as this is the only remedy by suit where a chattel can be regained in specie, unless in those cases where the party can recover possession in replevin; and, even in this form, it is at the election of the defendant whether he will deliver the specific goods, or pay the value as estimated by the jury; see 3 Bla. Com. 146; Wils. 120; Co. Litt. 296; Com. Dig. tit. Detinue; Petersd. Sup. to Blackstone, 133.

II. RELATIVE TO WHEN MAINTAINABLE.

BEAUMONT V. ——— M. T. 1675. K. B. 2 Mod. 140.

Per North, C. J. Where a person of quality, intending a marriage with a lady, presented her with a jewel, and the marriage not taking effect, he brought an action of detinue against her, and the Court were of opinion, that the property was not changed by this gift, being to a special intent; and the plaintiff recovered. [81]
Detinue* lies for a present made with a special intent.

* This action is only sustainable for the recovery of a personal chattel, and not for real property; see Cro. Jac. 39. Therefore it lies not for a house, see Cro. Jac. 39. And it is requisite that the thing detained should be capable of being specifically identified, or clearly distinguishable from the other property; hence it will not lie for money, unless in a box; see Cro. Eliz. 457; 1 Inst. 286; nor corn out of a sack; because these things have no peculiar mark or quality whereby they may be ascertained or known from other things of the same kind, so as to re-deliver them to the plaintiff; see Co. Litt. 286; Bac. Ab. Detinue, (B); 2 Bulst. 308. But it lies for a horse or cow; see F. N. B. 322; or for deeds or other writings, if the plaintiff can describe what they are, although the date be not mentioned; see Bac. Ab. Detinue; (B) Bull. N. P. 50.

III. RELATIVE TO BY, AND AGAINST WHOM, MAINTAINABLE.

1. **ROBERTS v WETHERALL.** E. T. 1695. K. B. 1 Salk. 223; S. C. 5 Mod. 193; S. C. Camb. 361. S. P. WILKIN v. DESFARD. H. T. 1793. K. B. 5 T. R. 112.

A person who has the right to possession of goods may maintain detinue.*

But detinue does not lie against an heir who is possessed of property as special occupant.†

By the navigation act, 12 Car. 2. c. 18. certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the King, another to him or them that will inform, seize, or sue for the same; and it was adjudged in this case, that the subject may bring detinue for such goods as the lord may replevin for the goods of his villein distrained; for the bringing the action vests a property in the plaintiff.

2. **ATKINSON v. BAKER.** E. T. 1791 K. B. 4 T. R. 229.

The declaration by an administratrix in detinue to recover certain indentures of bargain and sale; and release alleged that A. B. being seized for his own life of certain freehold estates, conveyed them to his heirs and assigns, and that the defendant as heir became possessed of them by finding. On demurrer, *Per Cur.* If an estate *pur auter vie* be limited to a man, his heirs, and assigns, and if it be not devised, it goes to the heir, under the statute of frauds, and is liable to the same debts as a fee simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it, subject to the same debts as personality of any description is, and by statute 14 Geo. 2. it is distributable. The first limitation here is to the heirs; and in the ordinary course of this species of property it goes to the heir at law, because it is a real estate. He is entitled to it as a special occupant, and has, consequently, a right to detain the possession of the documents which belong to it.

IV. RELATIVE TO THE AFFIDAVIT TO HOLD TO BAIL.

1. **REG. GEN.** H. T. 1808. K. B. 9 East. 325.

No person shall be holden to special bail in detinue

No person can be holden to special bail in trover or detinue without a special affidavit. * Although he never had actual possession, therefore an heir may maintain this action for an heir-loom; see Bro. Ab. Detinue, pl. 65. So if goods be delivered to A. to deliver to B. the latter may support this action, the property being vested in him by delivery to his use; see 2 Saund. 47. a. n; 1 Bro. Abr. tit. Detinue, pl. 30. 452; Rol. Abr. 606; Com. Dig. Detinue, n.

A party who has only a limited or special property in the chattel may also support this action, as, if a bailee deliver goods to another, he may bring an action of detinue against him, because he has the actual possession, and is responsible over to the original bailor; see Rol. Abr. 67; but if the plaintiff has not the right to immediate possession of the goods, and his interest be only in reversion, he cannot maintain an action of detinue; see Bro. Ab. Detinue, 7 T. R. 9.

† The gist of this action is the continued and wrongful detainer, and not the original taking; see 8 Bl. Com. 157; therefore it may be sustained against any person who has acquired possession of the chattel by lawful means, as by bailment, finding, or borrowing; see F. N. B. 138; and it is said, that if the defendant took the goods tortiously detinue cannot be supported, because by the trespass the property of the plaintiff in the chattel is divested, which ought to be unabated in him at the commencement of the suit; see Com. Dig. Detinue (D); Vin. Abr. Detinue (B) pl. 2; Cro. Eliz. 824; 6 H. 7, 9; though the accuracy of this doctrine appears questionable; see Cro. Eliz. 828; for it has been determined, that if a trespasser die possessed, the property is not thereby altered, and detinue will lie by or against his executors; see 1 Saund. 246. a; W. Jones, 173, 174.

This action cannot in any case be supported against a person who never had possession of the goods in question, as against personal representatives on a bailment to the deceased, unless they came actually into their possession; see 2 Bulst. 308; but if, after the death of the bailor, a stranger take the property, detinue lies against him; see Rol. Abr. 607; nor does it lie against a bailee, if before demand he lose them by accident; see ib. b. 2; tit. Detinue, pl. s. 32, 40; though if he wrongfully deliver the goods to another, he will continue liable; see 2 B. & A. 704.

In this action, if the defendant acquired possession of a chattel belonging to a feme covert before the marriage, the husband alone must sue, because the law transfers the property to him, and the wife has no interest, the wrongful detention being the cause of action; see Sid. 172; Noy, 70; Bul. N. P. 50; and if goods be delivered to a feme covert anterior to the marriage, and afterwards be detained, the action must be brought against the husband and wife; see Co. Litt. 351; but if the bailment were to them both subsequent to the marriage, the husband must be sued alone; see Rol. Rep. 128, and see iit. Baron and Feme.

cial application to the court, and an order being thereupon made for that purpose by the Lord Chief Justice, or one of the judges.

2. *LE WRIT v. TOLCHER*. M. T. 1738. C. P. Barnes, 79.

It was resolved in this case that no defendant could be held to bail without a judge's order

3. *REG. GEN.* H. T. 1808. Ex. 8 Price, 507.

Ordered, that no person be held to special bail in an action of trover or detinue, without an order by the Lord Chief Baron, or one of the Barons of this Court.

without a judge's order;*

[83]

And the same rule holds in C. P.;

And Exchequer.

V. RELATIVE TO THE PLEADINGS.

(A) DECLARATION.†

1. *MILLS N. GRAHAM*. M. T. 1804. C. P. 1 N. R. 140.

In detinue, the declaration alleged that the plaintiff being possessed, &c., casually lost, &c., and that the defendant then and there found the same; nevertheless he refused to deliver the same. The defendant pleaded the general issue; there was no evidence of loss nor finding; the plaintiff, however, had a verdict. On motion to set it aside, on the ground that it had not been proved that the goods were lost by the plaintiff, and found by the defendant.

The Court said, in trover the plaintiff always alleges a finding, but never proves it; and, from the very nature of the thing, it is often incapable of proof. A wrongful conversion, or a wrongful detainer after demand, is considered as evidence of finding; and we can see no reason for making a distinction between an allegation of finding in an action of trover, and such an allegation in an action of detinue. If the allegation were strictly true, it could scarcely ever be proved in either case, unless the defendant had himself acknowledged the finding. Besides, if the allegation of a particular bailment is material, it is also traversable; but the plea of the defendant here is, that he does not detain in manner and form as the plaintiff has alleged. This does not apply to the finding, therefore that point need not now be decided; because, if it be material, it ought to be traversed, in order to put in issue, which has not been done in this case.

It is usual to state in the declaration that the defendant has acquired the goods by finding. But this allegation is not traversable under the plea of *nil debet*.

[84]

2. *KETTLE v. BROMSALL*. M. T. 1738. K. B. Willes, 118.

In detinue the plaintiff declared that he delivered to the defendant certain things, specifying them to be kept, and to be delivered to the plaintiff when required; that, nevertheless, the defendant, though often requested, had not de-

* Antecedent to this rule the defendant might have been held to bail in detinue without any special application to the Court; see *Petersdorff's Bail*, 38. And it was sufficient for the affidavit to contain a general statement that the defendant had possessed himself of divers goods and chattels of the plaintiff of a certain specified value, which he had refused to deliver to the plaintiff, and had converted the same to his own use: see *Cowp.* 529; *1 Wills.* 335. But, even at that period, an affidavit stating, that "the defendant had converted and disposed of divers goods of the plaintiffs of the value of 250l., which he refused to deliver, though the plaintiff had demanded the same" and that neither the defendant nor any person on his behalf had offered to pay the plaintiff the 250l., or the value of the goods;" had been held to be insufficient, as it did not disclose in positive terms any legal cause of action against the defendant; for although it was alleged that the defendant refused to deliver up the property, it did not appear that the goods ever were in his possession: see *7 T. R.* 550; *1 H. Bl.* 218.

Since the introduction of the rules of court, which order that no person shall be held to bail in detinue without a judge's order, the affidavit must fully set forth and detail the circumstances under which the defendant obtained possession of the property, its particular kind and value, and manner in which the defendant converted and applied it to his own purposes; see *2 M. & S.* 563.

† This action is transitory: see *Com. Dig.* tit. Action (B); unless against justices of the peace and others; see *21 Jac. 1. c. 12*. A certain degree of accuracy and precision is required in describing the chattel; see *Co. Lit.* 286. b.; though it is not necessary, we may remember, to state the date of a deed; see *Rac. Ab. Detinue* (B.).

‡ In cases of special bailment it is advisable to declare at least in one count on the bailment; see *1 N. R.* 140. And, as debt and detinue may be joined, if it be doubtful whether a contract by the defendant for the purchase of the chattel can be proved, it is proper to insert a count in debt for goods sold, &c. in addition to that in detinue for the chattel, so that the plaintiff may be able to recover under one of the forms of action; see *Bro. Abr. Joinder of Action*, 97.

And the declaration should at least contain a request by the plaintiff on demand to deliver, &c.

livered the same, or any part thereof, to the plaintiff, but refused, and still both refuse, to deliver the same, &c. There was another count which contained no demand. It was objected that a demand ought to have been alleged.

Per Cur. Though there be no request in one count, a demand in the other But the sev will suffice; for if one of the counts be good, both will hold on general de-
 eral things murrer.

sued for
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 valued in
 the declara
 tion.

3. PALWEY V. HOLLY. M. T. 1773. C. P. 2 Blac. 853.

In detinue for two books of entries of admissions and surrenders in a copyhold manor, two other books belonging to the said manor, and divers court-rolls and writings, to the value of 500*l.* On the general issue pleaded, a verdict was found for the plaintiff, as to the two books of entries and admissions, value 100*l.* each, with damages 20*l.* and costs 40*s.*, and as to the residue, for the defendant. It was afterwards moved in arrest of judgment, that the several things sued for ought to have been separately valued in the declaration. But, by the Court, the nature of this action requires that the verdict and judgment be such that a specific remedy may be had for recovery of the goods detained; or a satisfaction in value for each several parcel, in case they be not delivered. This is as well done by severing the values in the verdict, as in the declaration, which is of no use: as in case of a judgment upon verdict, the jury must assess the damages according to their evidence; and in case of judgment by default, a writ of inquiry must be awarded for the same purpose.

See Bro. Ab. Detinue, (B.)

(B) PLEAS.

The general issue in detinue is *non detinet*, which denies the detention of the goods, and puts in issue the plaintiff's right, or former possession of them, and under it may be given in evidence a gift from the plaintiff, or any other fact, to prove that the property in the chattel is not in him; see Co. Litt. 283; though the defendant cannot show that the goods were pledged to him and remain unredeemed, but must plead such matter specially; see Bull. N. P. 51; Co. Litt. 283. But it is no plea to a declaration, averring that the plaintiff had delivered certain goods to the defendant to be kept safe; that after the delivery one J. S. stole them out of his possession: see 4 Co. 83. b; Cro. Eliz. 815. *Aliter* if it were a special bailment to keep them as his own; see Cro. Eliz. 815.

[85]

VI. RELATIVE TO THE EVIDENCE.

The defendant may avail himself of any material variance between the facts stated in the declaration and those substantiated in evidence; therefore, in detinue for the recovery of a bond for 100*l.* on bailment, if the defendant plead that he did not receive a bond for that specific sum, and if it be found that he received one for a larger amount, there must be a verdict for the defendant; because the bond apparently, and on the face of it, is not the same as the plaintiff sought to recover; see 2 Rol. Abr. 703,

VII. RELATIVE TO THE VERDICT, JUDGMENT, AND COSTS.

Where the action is brought for several distinct chattels, the jury ought to find the value of each particular thing; see 10 Co. 119; 2 Blac. 854; but a flock of sheep is entire; see 10 Co. 119; and if the jury neglect to ascertain the value, the omission cannot be supplied by writ of inquiry; see Salk. 206.

The form of the judgment is in the alternative, that the plaintiff shall either recover the thing in question, or, if he cannot have it in specie, the value thereof, and his damages for the unjust detainer, with full costs; see Cro. Eliz. 116; Tidd's Forms, 302.

VIII. RELATIVE TO THE EXECUTION.

Upon a judgment in detinue the execution is for the goods, or their value, with damages and costs; see Tidd. 1008. 7th edit.

Debastaff. See tits. *Executor and Administrator*.

Debation. See tits. *Insurance; Witness*.

De ventre inspiciendo.

Where a widow is suspected of feigning herself pregnant, with a view to produce a supposititious child; the presumptive heir may have a writ *de ventre inspiciendo* to examine whether she be pregnant or not; and if she be pregnant, to keep her under a proper restraint till she be delivered; see 1 Inst. 8. b. n. 1; 123. b. n. 1.

Devise. See *Curtesy; Executor and Administrator; Grants; Legacy;* [86.]
Trusts.

I. RELATIVE TO THE ORIGIN AND GENERAL NATURE OF DEVISES; AND HEREIN OF THE STATUTE OF WILLS, p. 95.

II. RELATIVE TO THE DIFFERENCE BETWEEN A DEVISE AND A TESTAMENT, p. 96.

III. RELATIVE TO THE GENERAL REQUISITES OF DEVISES.

(A) PARTIES TO THE DEVISE.

1st. As to who may be devisors and devisees..

1. Aliens, p. 97. 2. Bastards, p. 98. 3. Corporation, p. 98. 4. Duress, persons under, p. 98. 5. Females covert.

(a) When they may be devisors, p. 98. (b) When they may be devisees, p. 99.

6. Idiots and lunatics, p. 100. 7. Infants.

(a) When they may devise, p. 101. (b) When they may be devisees, p. 101.

8. Joint-tenants, p. 102. 9. King and Queen Consort, p. 102. 10. Papists, p. 103. 11. Persons uncertain, p. 103. 12. Traitors and felons, p. 103.

2d. As to the effect of a subsequent removal of a disability, p. 104.

(B) SEISIN OF TESTATOR, p. 104.

(C) THAT THERE BE A FIT SUBJECT FOR THE DEVISE TO OPERATE ON.

1st. Advowsons, p. 106. 2d. Annuities, p. 108. 3d. Chattels real, p. 108. 4th. Commons, p. 108. 5th. Contingent estates and interests, p. 108. 6th. Corodies, p. 110. 7th. Copyholds, p. 110. 8th. Dignity, titles of, p. 110. 9th. Entry, rights of, p. 110. 10th. Equities of redemption, p. 112. 11th. Fee-simple, estates in, p. 112. 12th. Franchises, p. 112. 13th. Lives, estates for, p. 112. 14th. Manors, p. 112. 15th. Mortgages, p. 112. 16th. Offices, p. 112. 17th. Possibilities, p. 113. 18th. Powers, p. 113. 19th. Rents, p. 113. 20th. Tithes, p. 113. 21st. Trust estates, p. 113. 22d. Ways, p. 113.

(D) THAT THE DIRECTIONS POINTED OUT BY THE STATUTE OF ERAUDS BE ATTENDED TO.

1st. In what cases requisite, p. 113. 2d. What these directions are.

1. That the devise be in writing, p. 114. 2. That it be signed, p. 115. 3. That it be attested.

(a) What is sufficient.

1. In general, p. 117. 2. When there are separate instruments, p. 122.

(b) At what time attestations should take place, p. 123. (c) As to who may be witnesses, p. 123.

IV. RELATIVE TO THE CONSTRUCTION OF THE FORMAL PARTS OF A DEVISE, AND OF WHAT THEY IN GENERAL CONSIST.

(A) GENERAL RULES OF CONSTRUCTION.

1st. Invention of testator.

(a) In general, p. 126. (b) As to where two opposite intentions are expressed in a will, p. 128. (c) As to where a particular and general intention are both expressed, p. 129.

2d. In relation to heir at law, p. 130. 3d. With reference to modes of expression.

1. That words are to be taken in their ordinary sense, p. 136. 2. That all the words are to be taken together, p. 137. 3. As to where expressions admit of two interpretations, p. 138. 4. That words are to be taken in their grammatical sense, p. 138. 5. As to technical expressions.

(a) In general, p. 139. (b) As to where a term is used to which the law has annexed one idea, and common opinion another, p. 140. (c) Where a term

[88] has obtained a definite technical meaning, p. 141.

6. As to where there may exist two constructions, p. 143. 7. As to transposing words, p. 144. 8. As to supplying words, p. 147. 9. As to changing words, p. 151. 10. As to rejecting words, p. 151. 11. As to where the same words occur twice, p. 152.

4th. As to the different clauses being explanatory, p. 152. 5th. As to false additions or mistakes, p. 154. 6th. As to when inconvenience or absurdity would accrue from the construction of a devise, p. 156. 7th. As to the admission of parol evidence, p. 156. 8th. As to how far the construction of a devise may be varied by subsequent events, p. 159.

(B) IN PARTICULAR.

1st. With reference to the creation of a devise, p. 159. 2d. With reference to the description of the devisees.

1. In general, p. 162. 2. As to particular expressions.

(a) Children.

(a 1) What class of objects the term comprehends.

(a 2) In general, p. 162. (b 2) Where there is a specified number, p. 163.

(c 2) As to the limitations over, p. 163.

(b) Descendants, p. 164. (c) Heir, p. 165. (d) Issue, p. 166. (e) Kindred, p. 166. (f) Next of kin, p. 167. (g) Next of testator's name, p. 167. (h) Posterity, p. 167. (i) Relations, p. 167. (k) Sons, p. 168. (l) Stock, family, or house, p. 168.

3. As to where a devisee is rightly described, but misnamed, p. 168. 4. As to where a person is properly named, but misdescribed, p. 169.

3d. With reference to the property conveyed.

1. As to what expressions will carry the reality.

(a) General rule, p. 170. (b) Particular expressions, p. 171.

[89] 4th. With reference to the quantity of property acquired.

1. In general.

(a) Introductory expressions, p. 179. (b) When restrained by subsequent words, p. 180.

2. As to a general devise.

(a) When confined to freehold lands, p. 181. (b) Operation of as to reversions, p. 184. (c) Operation of as to copyholds, p. 187. (d) Operation of as to mortgages and trust estates, p. 187. (e) Operation of, in regard to lapsed or void devises, p. 188. (f) Operation of, in regard to undisposed interests, p. 189. (g) Operation of, on a power of appointment, p. 190.

3. As to whether property acquired since making the will passes.

(a) In general, p. 190. (b) In the case of republication.

(a 1) General rule, p. 190. (b 1) Where the object of republication is apparent on the face of the instrument, p. 191.

4. As to the effect of particular forms of expression.

(a) In general.

(a 1) All my lands, p. 191. (b 1) All my mortgages, p. 191. (c 1) All my lands out of settlement, p. 192. (d 1) Appurtenances, p. 192. (e 1) Copyholds to which I became entitled, on the death of my father, p. 192. (f 1) Estates, for the purchase whereof I have contracted, p. 193. (g 1) Farms, p. 193. (h 1) Groundrents, p. 193. (l 1) House, p. 194. (m 1) Lands, p. 195. (n 1) Lands, tenements, and hereditaments, p. 195. (o 1) Messuages, p. 195. (p 1) My part, p. 196. (q 1) Premises, p. 196. (r 1) Share, or portion, p. 197. (s 1) Stock upon farm, p. 197.

(b) Reference to tenure, or occupancy.

(a 1) Now in the tenure of, p. 198. (b 1) Now in the occupation of, p. 199.

(c) Reference to locality, or other words of description, p. 200.

5. As to customary freeholds, p. 206.

5th. With reference to the quality of the estate conveyed.

1. Fee-simple.

(a) General rule, p. 207. (b) Effect of appointment of trustees of inheritance, p. 213. (c) Effect of particular expressions.

[90]

(a 1) All my freehold and leasehold estates, p. 214. (b 1) All my real property, p. 214. (c 1) All the rest and residue of my estate, p. 215. (d 1) Estate, p. 215. (e 1) Hereditaments, p. 222. (f 1) Inheritance, p. 222. (g 1) Interest, p. 222. (h 1) Part, p. 222. (i 1) Property, p. 222. (k 1) Quit Rents, p. 223. (l 1) Real Effects, p. 223. (m 1) Remainder, p. 223. (n 1) Residue, p. 224. (o 1) Right, title, and interest, p. 224. (p 1) Share, p. 224. (q 1) To be freely possessed and enjoyed, p. 224. (r 1) Whatever else I have not disposed of, p. 226.

(d) When implied.

(a 1) General observations, p. 226. (b 1) From a charge being imposed.

(a 2) On the devisee, or on the devisee in respect of the land.

(a 3) Of a gross sum.

(a 4) In general, p. 231. (b 4) For payment of debts and legacies, p. 233.

(c 4) After payment of debts, p. 234.

(b 3) Of a annual sum, p. 235.

(b 2) On the devisee in respect of the annual profits, p. 237.

(c 1) From a limitation over, or a dying under a certain age, p. 237. (d 1) [91]

From a devise to trustees for purposes requiring a fee, p. 238. (e 1) From the devise of a smaller estate to the heir at law, p. 243. (f 1) From a devise to several, to be equally divided, p. 243. (g 1) From analogy.

(a 2) A where a joint devisee takes a fee, p. 243. (b 2) As where an absolute interest is previously given in a chattel interest, p. 244.

(h 1) Effect of an alternative devise in fee, p. 244. (k 1) Effect of an indefinite devise limited in defeasance of a fee, p. 245.

(e) As to whether cross executory limitations can be implied among devisees in fee, p. 245.

2. Estate tail.

(a) General rule as to the creation of, p. 245. (b) As to construing particular words as words of limitation or of purchase.

(a 1) Rule in Shelley's case, p. 250. (b 1) Particular expressions.

(a 2) Heirs of the body.

(a 3) General rule, and herein of the effect of words of explanation, p. 257.

(b 3) Effect of superadded words of limitation, p. 258. (c 3) Effect of words of modification, p. 259.

(b 2) Children, p. 264. (c 2) Children and posterity, p. 266. (d 2) Issue.

(a 3) General rule, p. 266. (b 3) Exemplifications of the rule, p. 267.

(c 3) Effect of words of limitation, p. 274. (d 3) Effect of words of modification inconsistent with an estate tail, p. 275. (e 3) Effect of words of addition or explanation, p. 280. (e 2) Son, p. 281.

(c) In what cases implied, p. 282. (d) As to transposing the limitations of two devises, p. 286. (e) As to construing a limitation with reference to others ejusdem generis, p. 286. (f) As to connecting a will with another instrument, so as to give the first taker an estate tail, p. 286. (g) As to construing a codicil as distinct from a devise, so as to give an estate tail, p. 287. (h) As to what expressions raise cross remainders among devisees in tail, p. 287.

3. Estate for life.

(a) Where there are no words of limitation, p. 291. (b) Where words of limitation are added, p. 292. (c) Where an express estate for life is given, p. 293.

4. Terms for years, p. 294. 5. Estates Executory, contingent, or vested.

(a) As to estates vested, or contingent.

(a 1) General rule, p. 294. (b 1) In default of objects of preceding limitations, p. 298. (c 1) Where a particular estate intervenes, p. 300. (d 1) Effect of the contingency not accruing on subsequent limitations, p. 301.

(b) As to executory devises.

1. General rules connected with, p. 302. 2. In what cases allowed,

(a) With reference to the property conveyed.

(a 1) Estates of inheritance, p. 305. (b 1) Estates not of inheritance, p. 306.

(b) With reference to the period within which the limitation is permitted.

[93] (a 1) As to the estates of inheritance, p. 306. (b 1) Estates not of inheritance, p. 314.

3. Distinction between, and contingent remainders, p. 316. 4. As to limitations over, after an executory devise of the whole interest, p. 316. 5. As to cross-remainders connected with, p. 317.

7. Estates conditional.

(a) General nature of, and whether precedent or subsequent, p. 317. (b) As to particular conditions.

a 1) In restraint of residence, p. 319. (b 1) To assume a certain name, p. 320. (c 1) In restraint of alienation, p. 321. (d 1) In restraint of marriage, p. 323. (e 1) To receive no wages, p. 327.

(c) As to the performance of conditions, p. 328.

8. Estates joint or in common, p. 328.

6th. Limitations to survivors, p. 331. 7th. As to what words will make the property devised liable to debts and legacies.

1. Considered as to the mode of direction.

(a) With reference to the fund.

(a 1) Where no fund is specified, p. 335. (b 1) Where a fund is specified, p. 335.

(b) With reference to the parties to whom the direction is made.

(a 1) Where to executors generally, p. 336. (b 1) Where to executors being devisees, p. 336.

V. RELATIVE TO REGISTERING DEVISES, p. 337.

VI. RELATIVE TO THE EFFECT OF A DEVISE.

(A) IN BARRING DOWER, p. 337.

(B) ——— A JOINTURE, p. 339.

(C) ——— AN ESCHEAT, p. 339.

(D) IN SEVERING JOINT TENANCIES, p. 339.

(E) ITS EFFECT ON CONTINGENT USES, p. 340.

(F) ON THE RIGHTS OF CREDITORS, p. 340.

(G) AS CONNECTED WITH THE DOCTRINE OF MERGER, p. 340.

[94] VII. RELATIVE TO THE REMEDIES AT LAW CONNECTED WITH DEVISES.

(A) FORM OF ACTION.

1st. Where devisee is plaintiff, 341. 2nd. Where devisee is defendant, p. 342.

(B) PLEADINGS, p. 342.

(C) EVIDENCE.

1st. On plaintiff's part.

1. By devisee of freehold.

(a) Seisin of testator, p. 342. (b) Execution of the will, p. 342. (c) Death of the testator, p. 345.

2. By devisee of leasehold property.

(a) Execution of lease, p. 345. (b) Probate of will, p. 345. (c) Assent of executor to the bequest, p. 346.

3. By devise of copyhold.

(a) Admittance of testator, p. 346. (b) Execution of will, and in some cases surrender, p. 346. (c) Admittance of devisee, p. 346.

VIII. RELATIVE TO THE REVOCATION OF DEVISES.

(A) EXPRESS REVOCATIONS.

1st. By means of a subsequent will.

1. In what cases it in general produces such effect, p. 346. 2. Where the second will is not complete, *per se*, p. 348. 3. Where two wills are inconsistent, p. 348.

2d. By means of a codicil, p. 349. 3d. By means of a written declaration, p. 349. 4th. By cancellation, or obliteration.

1. What amounts to, p. 349. 2. As to a partial obliteration, p. 351. 3. Where there are duplicates, p. 352. 4. Admissibility of parol evidence to explain an apparent act of revocation, p. 352.

(B) IMPLIED REVOCATIONS.

1st. General rule, p. 352. 2d. Marriage, or the birth of a child, p. 353. 3d. Subsequent conveyance or change of estate.

[95]

(a) General doctrine, p. 357. (b) What conveyance or change has that effect, p. 357.

(C) PARTIAL REVOCATIONS, p. 363.

IX. RELATIVE TO THE REPUBLICATION OF DEVISES]

(A) MODES OF.

1st. By re-execution of a will, p. 364. 2ndly. By codicil, p. 365. 3dly. By cancelling a revocation, p. 366. 4thly. By surrender to the use of a will, p. 367. 5thly. In consequence of a conditional revocation not taking effect, p. 368.

(B) EFFECT OF REPUBLICATION, p. 368.

X. RELATIVE TO THE AVOIDANCE OF A DEVISE.

(A) AB INITIO.

1st. In consequence of the parties' incapacity.

1. As to the testator, p. 369. 2. As to the devisee, p. 369.

2dly. In consequence of the nature of the property, p. 369. 3dly. In consequence of the limitations in the will being too remote as to vesting, p. 369. 4thly. In consequence of the uncertain mode in which the property is conveyed, p. 370.

(B) BY MATTER EX POST FACTO.

1st. In consequence of devisee's death, p. 375. 2dly. By waiver, p. 376.

I. RELATIVE TO THE ORIGIN AND GENERAL NATURE OF DEVISES; AND HEREIN OF THE STATUTE OF WILLS.*

* The power of devising lands existed in the time of the Saxons; Spel. Tr. Feud. 22; Wright's Ten. 172; 2 Inst. 7; but, upon the establishment of the Normans it was taken away, as inconsistent with the principles of the feudal law; and although many of the restraints on alienation by devise were removed before Glanville wrote, yet the power of devising lands was not allowed for a long time after; the cause of which has been imputed partly to an apprehension that the infirmity and consequent imposition to which a testator was exposed, rendered such devise suspicious, and partly to this species of conveyance not being attended with that notoriety and public designation of the successor, which, in descents, is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property, but which did not exist in the case of a devise; 1 Rol. Abr. 606; 1 Bl. Com. 374, 375; Wright, Ten. 173. But whatever inconveniences might be incident to this mode of alienation, to take effect after the death of the owner, it was soon found that there was no other way of rendering real property subservient to the casualties that arise in family affairs; for in direct successions, ab intestato, of real estates, the succession was governed by the political consequences of a positive system, which constituted the eldest son only heir.

During the suspension of this power, therefore, which continued from the reign of Henry the Second to the latter end of that of Henry the Eighth, the necessity of family arrangement made the people ready to receive with avidity any contrivance to reinstate them in the possession of the valuable privilege of devising; Gilb. Dev. 9; Hale's Hist. C. L. 222; and the ingenuity of the ecclesiastics soon furnished them with a means by which they might substantially, though not directly, enjoy this privilege, under colour of a declaration of uses. But the practice of devising the use of lands carried the power of disposing of real property much further than was consistent with the nature of tenures; it tended to deprive the lord of his wardship, profits of marriages, and reliefs, and the King of his primer seisin, livery, and fines for alienation. This, together with many other inconveniences that flowed from the doctrine of uses, was removed by the statute 27 H. 8. which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them, and so had the effect of wholly destroying all distinction between them, till the means to evade this statute, and by very strained construction, to make its operation dependant on the intention of parties, was invented. The consequence was, that lands once more became alienable, unless by conveyance, to take effect in the life-time of the proprietor; Harg. Notes to Co. Lit. III.† However, the bent of the times inclined strongly in favour of alienation, and the necessity of there being some mode by which men might render their property subservient to family purposes was so obvious, that the legislature found it necessary; within a very few years, to interfere

† The statutes of wills being in the affirmative, were held not to take away the custom of devising; and formerly it was of importance, in many cases, to resort to the custom of devising, as being most beneficial for the devisee. But now the two powers being assimilated, and made for the most part commensurate, it can seldom happen that it should be necessary to call in aid the power by custom, though it is possible, as when the custom

[96] II. RELATIVE TO THE DIFFERENCE BETWEEN A DEVISE AND A TESTAMENT.*

[97] III. RELATIVE TO THE GENERAL REQUISITES OF DEVISES.

(A PARTIES TO THE DEVISE.)

1st. *As to who may be devisors and devisees.*1. *Aliens.*

in the regulation of this species of conveyance; and the Crown was easily prevailed on to give its assent, by a statute made for that purpose to the establishment of devises; especially as it was done in a manner that could be but of small detriment to the military tenures, which were then upon their decline in this country. For this purpose an act was passed, 32 H. 3. entitled, "The Act of Wills, Wards, and primer Seisins," reciting that persons of landed property could not conveniently maintain hospitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables; it therefore enacts, that all and every person and persons, having manors, lands, tenements, or hereditaments, may give and dispose of them, as well by last will and testament in writing, as by any act executed in their life-time, in the following manner: if they held in socage, they might devise the whole; and if they held of the King, or of any other person by knight service, they might devise two parts, or as much as should amount to the yearly value of two parts in three, in certainty, and by special divisions, so as it might be known. By the 34 & 35 H. 8. c. 5. intituled, "The Bill concerning the Explanation of Wills," reciting that several doubts, questions, and ambiguities, had arisen upon the stat. 32 H. 8; it was enacted, sec. 3, that the words, estate of inheritance, used in that statute should mean only an estate in fee-simple. And it was further enacted by sec. 4, "That all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple, in co-parcenary, or in common in fee-simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate,) by his last will and testament, in writing as much as in him of right is or shall be, all his said manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure." Under the authority of the above statutes, no more than two-thirds of land held by knight service, either of the King or of a subject, could be devised; but, in consequence of the abolition of military tenures, and the conversion of knight service and all the other old modes of holding lands into common socage, the operation of these statutes was extended to all freehold estates in fee-simple.

The legislature also found it necessary, for reasons, which will be stated in a future part of this work, to add further regulations to this mode of conveyance, which were effected by the statute of frauds and perjuries, passed in the 29th year of the reign of Charles II.; Com. Dig. Devise; Bac. Ab. Wills and Testaments; Vin. Ab. Devise; Cruise. Dig. Devise; Preston on Estates, tit. Wills; 2 Bl. Com. 375; Powell on Devises. chap. 1

* The idea of a devise of land was evidently taken from the *testament* of the Roman law, which was at all times allowed in England with respect to personal property. But the power of devising lands being given by positive statutes is only co-extensive with the words of those statutes. A devise is therefore founded on different principles, and governed by different rules, from a testament which, in the English law, is only an instrument to transmit personal property; for a devise is considered not so much in the nature of a testament as of a conveyance delivering the uses to which the land shall be subject after the death of the devisor. The word *testament* was, in the Roman law, applied only to dispositions which contained the institution or appointment of an heir who was to take all the property of the estates. All other dispositions, in which there was no heir named, were called codicils, or donations in contemplation of death. But the English law does not admit of such distinctions; for, a devise does not necessarily imply the appointment of a general heir, or a disposition of all the testator's lands, but only those which are particularly mentioned; and the residue descends to the heir, as if no such partial devise has been made; 6 Cru. Dig. p. 6.

* It has been seen (*ante*, vol. i. p. 465. n.) that the disability of an alien to hold freeholds for his own benefit is not to be considered as a penalty or forfeiture, but it arises merely from the policy of the law. In the case, therefore, of Knight v. Deplensis, 2 Ves. sen. 560. where this objection was urged to the validity of a devise, though the point did not then call for decision, Lord Hardwicke said, that he could not cite a case that such a will would be good, but he did not remember any doubt or distinction made between a part conveyance or devise to an alien; for an alien might take. The only consideration, there-

enables an infant of fourteen, or a *feme covert*, to devise lands; 1 Inst. 111. b. n. 4; 3 Rep. 35. a.

The power of devising continued, however, as to socage lands situated in cities and boroughs, and also as to all lands in Kent, held by the custom of gavel-kind; Rob. Gav. 234.

2. Bastards.*
3. Corporations.†
4. Duress, persons under.‡
5. Femes Covert.

(a) *When femes covert may devise.*§

fore, would be for whose benefit, and if he might take for the benefit of the crown. There was no rule of law, or upon the statute of wills. in the way, why he might not take by devise. This opinion of Lord Hardwicke is countenanced by the opinion of the court in *Godfrey v. Dixon*; Godb. 275; Noy. 187; that on a covenant to stand seised, an use will arise to an alien; for it follows that before the statutes of uses and wills, a declaration of the use to an alien by will would have been good; and then it is clear that a devise after the statutes of wills to any person who was capable of taking before by a will disposing of an use, is valid. Then the question is, to whose use, or for whose benefit he shall take; with regard to which the rule is, that the lands belong to the King, but do not vest in him during the life of the alien until office found; and, therefore, a recovery by an alien tenant in tail, will bar the remainders, he being tenant of the land; but if he die before office, the law casts the freehold and inheritance upon the King for want of heirs, an alien having none; Gouldsb. 102; 4 Leon. 84; 9 Co. 141; and Powell on Devise, Ch. 7.

* Illegitimate children born at the time of making the will may be objects of a devise by any description they have acquired by reputation. In the case of a devise, therefore, to the natural children of a man or woman, or both, it is simply necessary to prove, that the objects in question had, at the time of making the will, acquired the reputation of being such children. It is not the fact, which the law will not inquire into, but the reputation of the fact that entitles them. The only questions, therefore, that can now be raised on such devises are, whether, upon the construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty; for, let it be remembered that though illegitimate children in esse may take under any description adequately describing them, yet it has long been an established rule, that a devise to children, sons, daughters, or issue, imports *prima facie* legitimate children, or issue, excluding those who are illegitimate, agreeably to the rule, *qui ex damnato coitu nascuntur inter liberos non computantur*; nor will circumstances, or expressions affording mere conjecture of intention, be a ground for their admission; 3 Anstr. 684; 5 Ves. 530; 1 Ves. & Bea. 424; Powell on Devises, by Jarman. p. 342.

† Bodies politic and corporate are expressly disabled by the statute 34 and 35 Hen. 8. c. 5. s. 14. from taking by devise, in conformity to the spirit of the laws against mortmain. It was, however, formerly held, in consequence of the statute 43 Eliz. c. 4. in support of charitable uses, that a devise to a corporation for a charitable use was valid as operating in the nature of an appointment. But now, by the 9 Geo. 2. all devises to charitable uses are rendered void, except such as shall be made to the two universities, and the colleges of Eton, Winchester, and Westminster. But the King, being both a body politic and corporate, is incapable of taking by devise; 1 Eden. 10; 6 Cru. Dig. 17.

‡ This operates as a disqualification of a person as a devisee; for, although not expressly provided against in the statute 34 H. 8. it seems necessarily to be implied from the words in the act, "at his free will and pleasure." And consonant thereto it was held by Rolle, C. J. (Sty. 427.) that, if a man makes his will in his sickness, by the over importunity of his wife, to the end of having quiet, this should be said to be a will by restraint, and should not be a good will; see Dyer, 143. b.; Raymond. 334; 1 Chit. Rep. 66; Com. Dig. tit. Devise, H. 1. But there must be actual proof of some undue importunities of, or restraint upon, the devisor, as the law will not avoid a will regularly made; Rep. in Ch. 125; 3 Ch. Ca. 103.

§ Married women are expressly disabled by the statute of wills from devising their lands; 4 Co. 61. b.; Hob. 225; 1 Co. Lit. 112. b.; Dyer, 354; Swinb. 88; Godb. 14; Pl. 22, id. 143; Pl. 178; 3 Com. Dig. tit. Devise, H. 3. and note; 1 D. & R. 81; Cro. Jac. 426; Cro. Eliz. 48; 1 Dow. 289. But as has been seen, *ante*. vol. 4. p. 65. since the authority of courts of equity has been fully established, and the doctrine of powers and trusts extended, to answer those purposes of family arrangement, which could not be obtained, whilst the strictness of common law conveyances prevailed, modes have been adopted by which femes covert may, by agreement, retain or procure in that situation the same powers over their own estates, real as well as personal, as they possessed while sole. If such agreement be made before marriage, it may be made without a fine or recovery; if after marriage, there must be a fine levied, or recovery suffered; because the property of a feme covert, pending the coverture, cannot be affected by any act of herself or her husband, unless through the medium of those species of common assurance.

This is effected by two modes of settlement, viz. either by way of trust, or by way of power over an use; 2 Ves. 191. The latter is the most usual mode of making such settlement; as if a woman convey an estate to the use of herself for life, remainder to the use of such persons as she, by any writing, &c., shall appoint; and, in default of appointment, to her own right heirs, the execution of such power reserved to her will be supported in Chancery, and by courts of law too; for the statute of 27 Hen. 8. has, by transferring uses into

[99]

*(b) When femes covert may be devisees.**

possession, incorporated the estate and the use together; in consequence of which, uses created by powers, or any other means, are become legal estates, and may be judged of in courts of law. It is observable, that every appointment, when executed, takes its effect, by virtue of that execution of the power, as if the limitation in the instrument of appointment had been contained in the deed creating the power: for it takes effect out of the estate of the author of the power at the time of the creation of the power; and consequently, if the author of the power has an estate, at the time of its creation, out of which he can then carve such an estate, as the power has for its object the creation of, that estate will spring up when it is executed; as the power will then operate, as to its effect, on the estate out of which the limitation is to arise, as if it had been limited when the power was created. And when a feme sole, contracting as to the disposition of her property, instead of immediately limiting it to a particular person, limits to a person or persons to be afterwards appointed, the disposition of the property is considered as taking place then, though the nomination of the appointee of it is not made until the execution of the power by the actual appointment.

The deed of settlement, and not the deed of appointment, is considered in equity as the alienation; and when a feme sole contracts that the person to take by her settlement made in presenti shall be nominated by a deed in writing, or by a will, or other instrument in nature of a will, &c., to be executed in future, the latter instrument does not take effect as a deed or instrument of alienation made by her under the character of a feme sole, but merely as an appointment of the person to take, pursuant to the mode prescribed in the original contract. If the disposition of the property of a feme sole be, on her marriage, left to rest on an agreement, by which she, in consideration of that marriage, agrees with her husband, that she may, by writing under hand executed in the presence of witnesses, or by will, dispose of her real estate, such an agreement between husband and wife gives her a right to come into a court of equity, after the marriage, to compel her husband to carry it into execution, and to join with her in a fine to settle the estate either on such trusts, or to such uses, as would give effect to the agreement; see 2 Ves. 64, 612; 6 Bro. P. C. 152; 2 Eq. Ca. Abr. 157; Ambl. 468; 2 Eden. 239; S. C. 1 Bro. P. C. 486; Sugden on Powers, 3rd edit. 148; nor is it material as between the parties themselves, whether the articles were made before or after the marriage; with this qualification, that the heir cannot be affected by the contracts of the wife during coverture. In the late case of *Werrall v. Jacob*, 3 Mer. 256, post-nuptial articles were decreed to be carried into execution under these circumstances. A man, on separating from his wife, entered into a covenant with a third person, to release to trustees a reversionary estate in fee in some property, to such uses as the wife by deed or will should appoint; in consideration of which the covenantees agreed to indemnify the husband against the debts of the wife. The wife made a will, and the court, at the suit of her devisee, decreed the execution of the husband's covenant, and that the trustees' covenant to indemnify the husband against the debts of the wife, was a valuable consideration to support the deed against creditors. The husband having become bankrupt, his assignees were decreed to join. It seems that a feme covert does not forfeit her interest under articles by adultery, as she does her right to dower at common law, by statute 13 Ed. 1. c. 34; *Seagrave v. Seagrave*, 13 Ves. 439; see further as to wills in the nature of appointments by femes covert, *Grigby v. Cox*, 1 Ves. sen. 517; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 75; *Henley v. Phillips*, 2 Atk. 48; *Ross v. Ewer*, 3 Atk. 160; *Socket v. Wray*, 4 B. C. C. 483; *Compton v. Collinson*, 1 H. Bla. 324; *Fettiplace v. Gorges*, 1 Ves. jun. 46; S. C. 3 B. C. C. 8; *Goodill v. Brigham*, 1 Bos. & Pul. 198; and cases there referred to; *Doe, d. Hodsdon, v. Staple*, 2 T. R. 684; *Reid v. Shergold*, 10 Ves. 370; *Parkes v. White*, 11 id. 209; *Driver v. Thompson*, 4 Taunt. 294; *Lee v. Muggeridge*, 1 Ves. & Bea. 118; *Dillon v. Grace*, 2 Sch. and Lef. 456, et ante, vol. iv. tit. *Baron and Feme*.

But although an instrument in nature of a will, executed by a feme covert, under a power, by deed or will, to declare and limit her real property to such persons for such estate therein as she shall direct, does not take effect strictly and properly as a will, taking its inception as an independent act of the mind at the time of its execution, but as an appointment or dependent act, referring back to the settlement out of which it issues, and by which it is created, and deriving from that all its operative faculty; yet, in all other respects—viz. as to the external form, and its action upon the estate settled, it partakes in all respects the nature of the instrument to which, by the terms of the settlement, it is to be analogous; therefore, the same disqualifications that create a nonability to devise in other cases extend also to this case; 3 Atk. 697; S. C. 2 Ves. jun. 298; 1 Powell on Dev. by Jarman, Ch. v.

A woman whose husband has abjured the realm, or who has been banished for life by act of parliament, may in all things act as a feme sole, and may therefore make a will of her lands; 1 Inst. 183. a.; 2 Vern. 104.

As to the devise of copyhold estates, it has been held that, where a woman surrendered to the use of her will, and afterwards married, the surrender was suspended during the marriage; and that a disposition by will, of the copyhold, by the wife, was void; notwithstanding that, by articles previous to the marriage, the husband had agreed that she should have power to devise it; Ambl. 627.

* A married woman is not thereby disabled from being a devisee in a will. And, although she cannot take any thing from her husband directly by deed, yet neither the custom of devising, nor the statute of wills, disqualify a wife from being the devisee of her husband, be-

6. *Idiots and lunatics.**

7. *Infants.*

(a) *When they may devise.†*

(b) *When they may be devisees.*

DOE, D. CLARKE, v. CLARKE. H. T. 1795. C P. 2 H. Bl. 399 S. P. SCATTERWOOD v. EDGE. 1 Salk. 230. S. P. SNOWE v. CUTTLER. 1 Lev. 135. 156; Sid. 153; 1 Keb. 567; 2 Keb. 11. S. P. TAYLOR v. BIDDALL. 1 Freem. 244; S. C. 2 Mod. 292. S. P. NURSE v. YEARWORTH. 2 Mod. 8. S. P. GULLIVER v. WICKETT. 1 Wils. 105. S. P. ANDREWS v. FULHAM. T. T. 1738. K. B. 2 Str. 1092.

The testator devised to his brother H. C. and his assigns for his life, remainder to the use and behoof of all and every such child or children of his said brother, as should be living at the time of the decease. H. C. died, leaving several children and his wife pregnant, who was delivered seven months after of a daughter. The question was, whether the posthumous child took any thing under this devise?

The Court said: it is plain on the words of the will the testator meant that all the children whom his brother should leave behind him should be benefited. In equity there are two classes of cases on this subject: 1st, When the bequest is in the nature of a portion or provision for children, and there an after-born child takes his share with the rest; of which class is the case of *Millar v. Turner*, 1 Ves. 85; the 2d, Where the bequest arises from some motives of personal affection, and there it is confined to children actually in existence. Of this second class was the case of *Cooper v. Forbes* 2 Bro. Ch. Ca. 38. which therefore makes a striking difference between that case and the present. Here the bequest is not confined to children living at the death of the testator, but is kept open till the death of his brother. It seems, indeed, now settled that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for his own benefit; *Lancashire v. Lancashire*, 5 T. R. 49. And in a sensible treatise lately published, *Watkin's Law of Devises*, 142. after the discussion of the interests of posthumous issue, the whole is summed up by saying, "It is now laid down as a fixed principle, that cause the devise does not take effect till the death of the husband, by which the marriage is dissolved, and they cease to be one person; *Lit. s. 168; 1 Inst. 112. n.* Where lands are devised to a feme covert for an estate of inheritance, the husband is seised of them in her right during their joint lives, and in case he has issue by her, capable of inheriting, born alive, he takes a further estate for his life in the wife's inheritance, whether legal or equitable, as tenant by the curtesy, and subject to that estate, the lands descend to the wife's heir, general or special, according to the term of the limitation. Nothing but an alienation by fine, or recovery, can prevent this devolution of the property, unless indeed, with regard to estates in fee simple, the devisee survive her husband, in which case her personal incapacity being removed, she may dispose of the property by will, or any other mode of disposition; see 1 Powell, by Jarman, 255. n.

* A mad or lunatic person cannot, during the insanity of his mind, make a testament of lands or goods; but if during his lucid intervals, he make a testament, it will be good; *Swinn. 72.* Lord Eldon lately mentioned in the House of Lords, his having been concerned in a cause, in which a gentleman, who had been some time insane, and was confined at Richmond had made a will. It was of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and yet, in every respect, pursuant to what he had declared, before his malady, he intended to have done. And it was held he was of sound mind and judgment at the time; *vide* his Lordship's judgment in *M'Adam v. Walker*, 1 Dow, 179. With respect to wills of real estate, the statute of frauds, in imposing the necessity of an attestation by witnesses in the testator's presence, has provided the means of ascertaining the state of the testator's mind at the moment of execution, and it is their duty to be satisfied of his sanity before they attest; 1 Powell on Devises, by Jarman, p. 131.

† Persons under the age of 21 years are incapable of devising their lands. But if there be a local custom that lands and tenements within a certain district shall be devisable by all persons of the age of 15 years or upwards, a devise of such lands by an infant of 15 will be good; *Perk. 221. M. 36. H. 6. 5.*

An infant may devise the guardianship of his child by virtue of the statute 12 Car. 2, c. 24. and it has been contended that such a disposition will draw after it the land as incident to the guardianship; but this point has not been determined; *Vaugh. 177; 6 Ciu. Dig. 14.*

[100]
All natural persons, who are *in esse* at the time when a will is made, and who are capable of acquiring lands by purchase being capable of taking by devise, no ob-

[101]
jection exists to the validity of a devise to an infant. But altho' it has never been doubted, that an infant *in esse*, at the time when a will is made, may be a devisee, it was at one time surmised, whether a devise to an infant *en ventre sa mere* was sustainable. It is now, however, clearly settled in the affirmative.

wherever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born."

[102]

8 *Joint-tenants.**

SWIFT, D. NEALE, v. ROBERTS. E. T. 1764. 3 Burr. 1488; S. C. 1 Bl. Rep. 476.

The wills of joint tenants are not rendered good by a severance of the joint tenancy.†

A. B. and C. D. were seised of the premises in question, as joint tenants in fee. A. B., on the 20th of January, 1754, made his will, and thereby devised in these words: "*Inprimis*, I give and bequeath all my part, right, title, and interest, which I have in an estate jointly with my sister C. D., to my wife Jane." Afterwards, by indenture of lease and release, A. B. and his sister made a partition, and severed the joint tenancy; and the estate in question was conveyed to A. B. in fee. The question was, whether the will was good as to this estate.

The Court was clearly and unanimously of opinion, that a will made by a joint tenant, during the continuance of the jointure, was not a good will, even as to a share of his estate, under the statute of wills, notwithstanding a subsequent severance of the joint tenancy, by a partition, unless there was a republication of it after the partition.

9. *King and Queen Consort.‡*

* It is laid down by Littleton (sec. 287.), and confirmed by Lord Coke (Co. Litt. 185. a.; Perk. sec. 500.), speaking of devises by the custom, that, if there be two joint tenants of lands in fee-simple, within a borough where lands and tenements are devisable by testament, and if one of the two joint tenants devise that which belongs to him, and die, this devise is void; because, no devise can take effect till after the death of the devisor; and by his death, all the land presently comes by law to his companion who survives, by the survivorship; for he does not claim, nor is entitled to the estate by the deceased joint tenant, but by a title paramount. And, therefore, although his title, and that of the devisee, commence at one and the same instant, and although an instant (according to its common signification) is an indivisible time, and, as it is well expressed, the ending of one time and the beginning of another; yet, in consideration of law, and for the purposes of justice, there is priority of time in an instant; and, therefore, in this case, the survivor is preferred to the devisee; for, as Littleton expresses it, the former claims by the death, the latter after the death; and therefore, although the titles commence at one instant, yet the law allows priority of time in that instant, which Littleton distinguishes by *per* and *post*. And, although joint tenants are not mentioned in the statute 32 Hen. 8., nor expressly excepted in 34 Hen. 8., yet they are thereby tacitly precluded from devising, not only by not being therein expressly empowered as tenants in coparcenary and in common are, but by the power of devising being confined to persons sole seised; 1 Powell on Dev. chap. v.

† Nor by subsequent survivorship; 1 Eq. Ca. Ab. 172. 178. And, though the joint tenancy be avoided by an incident which has relation, as to some purposes, to the original commencement of that tenure, and operates to avoid it *ab initio*: yet such relation will not give efficacy to a will made when, in course of common law, the tenure was joint; Poph. 87; 3 Rep. 25. a.; 1 And. 348; S. C. Moore, 254.

‡ It is stated in Brooke's Abr. tit. Prerogative, 5. to have been laid down by Fortescue, in 35 Hen. 6. that the King could not devise land by his testament; but it appears from the Rolls of Parliament that the kings of England were in the practice of conveying lands to trustees to the use of their wills; and it has been enacted by a modern statute, 39 & 40 Geo. 3. c. 88. s. 4., that His Majesty, His heirs, and successors, may, by will, devise any manors, messuages, lands, tenements, and hereditaments, purchased by, or which shall come to His Majesty, His heirs, or successors, out of any moneys issued and applied for the use of his or their privy purse, or with any other monies not appropriated to any public service, or any manors, &c. which have come to His Majesty, or shall come to Him, His heirs, or successors, by gift, devise, or descent, or otherwise, from any of His, or their, ancestors, or any other person or persons, not being Kings or Queens of this realm. The same statute (s. 8.), after reciting that, by the law of England, the Queen Consort, wife of the king was capable of taking, granting, or disposing of property, as if She were a feme sole. but that doubts had arisen, how far this capacity for granting or disposing of property extended; and especially whether, during the life of the King, her husband, it included the power of devising and bequeathing by last will and testament; and reciting that His Majesty was desirous that Her Majesty, during the King's life, should have full power by her last will and testament to dispose of any manors, messuages, lands, tenements, and hereditaments, purchased by, or in trust for, Her Majesty, or which should thereafter vest in Her Majesty, or in any other person in trust for Her, as fully as if She were sole and unmarried; it is enacted, that it shall be lawful for Her Majesty, by her last will and testament in writing, attested by three or more witnesses, to dispose of such estate as She in

10. *Popists.**

11. *Persons uncertain.*

[103]

BATE V. AMHERST AND NORTON. M. T. 1663. K. B. T. Raym. 82.

A. B. by will devised all his lands in Kent and Sussex to one of his cousin's N. A.'s daughters, that should marry with a Norton within fifteen years. N. A. had three daughters, E, A, and M. Stephen Norton married E, and on a question between the heirs at law and the devisee, who should have the land, one objection taken by the heir at law, was that the devise was void for uncertainty as to the person, for two might marry with a Norton. But the Court agreed that the devise was good, notwithstanding the uncertainty; for that, although the words were not, who should first marry with a Norton, yet it was all one, because the law supplied these words, and therefore it should not be presumed that more than one should marry a Norton, especially as the words of the will fixed in a single person; and they said there was a difference when there was uncertainty in the event, and uncertainty in the person.

A devise to a person uncertain; as to such of the daughters of A. as shall marry a man of the name of Norton; is good.†

The subsequent removal of [104] any disability which existed at the period of making the will, will not establish a devise otherwise void.

12. *Traitors and felons.†*

2d. *As to the effect of a subsequent removal of a disability.*

HAWK V. BURTON. E. T. 1687. K. B. Comb. 84. S. P. **HERBERT V. TORBALL.** 1 Sid. 162; S. C. Rd. 84. S. P. **ARTHUR V. BOKENHAM.** 11 Mod. 157.

A B. when of full age declared, in the presence of several witnesses, that his will made when under age should stand. It was, however, adjudged, that the will was void, on account of the infancy of the devisee at the time of the first publication. §

(B) *SEISIN OF TESTATOR.*||

BRUNKER V. COOK. T. T. 1767. K. B. 11 Mod. 121; 1 Salk. 237.

A person devised all such sums of money, lands, tenements, goods, chattels, and estates whatsoever, wherewith at the time of his decease he should be authorised by that statute to grant by deed; and, by the 9th section, the like power is given to all future Queens.

In the case of *Marwood, d. Jennell, v. Darrell, Ca.*, Temp. Hardwicke, p. 91. a Papist was held unable to take by will. But since the statute of the 18 G. 3. c. 60. which repeals so much of the statute of the 11 & 12 W. 3. c. 4. as disables persons educated in the Popish religion, or professing the same, under the circumstances therein mentioned, to inherit, or take by descent, devise, or limitation in possession, reversion or remainder, within the kingdom of England, &c. provided such persons, within the time limited by the act of the 18 Geo. 3., take the oath prescribed thereby; Papists complying with the oath, are capable of being devisees of real property.

† So a devise may be to A. or B. which shall have issue first; or to the first son of A. that shall have issue; Lit. Rep. 256.

‡ Such parties cannot devise. The lands of a traitor are forfeited to the King by stat. 6 Ed. 6. c. 11. s. 9.; and those of a felon escheat to the King, or the intermediate lord; see *Swinb.* 97.

Acts of Parliament, at this day, in making an offence felony, generally save the corruption of blood, which, otherwise, would be a consequence of it: and the effect of such a saving, is, to cause the land to descend to the heir (1 Hawk. 107; 3 Inst. 47.) uncontrolled by any will or disposition of the owner. The stat. 54 Geo. 3. c. 145. generally called Sir S. Romilly's act, takes away corruption of blood as a consequence of attainder, except in cases of high treason, petit treason, and murder; and see *ante*, vol. ii. p. 490. n.

§ But, if the will had been re-published after the devisee attained his full age, it would have been good; 1 Salk. 238.

|| Lands contracted for may be devised. There must, however, be express articles, or a positive agreement, binding within the statute of frauds, for the purchase of an estate entered into, and completed, before the execution of the will, otherwise such estate will not pass by it; 2 P. Wins. 629; 11 Ves. jnn. 550. The true principle is, that where the contract is such as could have been enforced against the deviser at the time of his decease, the estate which is the subject matter of the contract, or failing that, the benefit of the contract, belongs to the devisee as heir; but, if from a defect of title, or any other cause, the contract was not binding on the deviser or ancestor at his death, his devisee or heir will have no equity to say, they will take the estate with its defects, or have the purchase-money laid out in the purchase of another; 10 Ves. 597; 1 Ves. sen. 218.

Sometimes contracts are entered into with lessees, giving them an option to purchase within a prescribed period; and, if this option be not discharged in the lessor's life-time, it raises a question as to the effect of a subsequent exercise of it upon the representative

devisor
should be
seised or en-
titled.*

[105]

There are,
however,
some few
exceptions,
such as in
the case of
tenancies as
cheated.

So a devise
of the ma-
noperates
upon copy-
holds, ac-
quired by
surrender
to him after
wards.†

essed or invested, to his wife. Nine years after, the testator received a sum of money in right of his wife, which he laid out in the purchase of an estate in Kent, of the nature of gavelkind, and died without having re-published his will. The heir at law of the testator entered, and his widow brought an ejectment to recover the possession. The jury found a special verdict, stating the above facts; and that by the custom of gavelkind, any tenant being seised of lands in fee, might devise the same by will in writing. The Court was of opinion that the lands did not pass; and Lord Holt said: the lands purchased after the execution of the will did not pass by it, because the law of England was plain as to this point by all the precedents; and the law was the same of lands devised by custom, as of lands devised by statute; and whenever a will was pleaded, it was always said that the testator was seised in fee, and being so seised made his will, which plainly showed that it was absolutely necessary he should be seised in fee at the time of making his will;† and see, as to copyholds, *ante*, vol. vi. p. 415.

2. *BUNTER v. COOKE*. M. T. 1707. K. B. 1 Salk 238; S. C. 11 Mod. 129. A person devised his manor of A., and, subsequent to the execution of his will, but before his decease, a tenancy escheated. It was admitted, that the land comprised in the tenancy would pass to the devisee.

3. *ROE, D. HALE, v. WEGG*. T. T. 1796. K. B. 6 T. R. 708.

A. B. devised the manor of King's Walden, with the appurtenances and all his messuages, lands, tenements, and hereditaments, in the parish of King's Walden, to C. D., who, after making his will, purchased a copyhold, parcel of the said manor, and held of himself as lord of the manor; and the same was surrendered to the use of A. B. and his heirs. It was held, that this copyhold passed by the will of A. B., because, in the eye of the law, the copyholders in the manor are only tenants at will to the lord, who is seised of the freehold and inheritance of the whole. Now, when the lord, in this case, made his will it operated upon the whole manor, including the demesnes and services; and when the copyhold was purchased by the lord, it was still part of the manor, and passed by a devise of the manor.

(C) THAT THERE BE A FIT SUBJECT§ FOR THE DEVISE TO OPERATE ON.¶

claims of his devisee, or heir and personal representative. It is now settled that in such a case, the rents, until an election to purchase be made, belong to the heir, or devisee; but that, when it is made, the purchase-money goes to the personal representative of the vendor, as in other cases; 14 Ves. 591. 596. If such purchaser *sub modo* elect not to purchase, the property of course remains unconverted, being in the same situation as if no contract had been entered into; 1 Powell on Dev. by Jarman, 163.

In the case of lands contracted for, or a trust estate, the equitable right must continue undisturbed. And, where the devise is of an estate in remainder, or reversion, it must not be divested or turned to a right; 6 Cru. Dig. 36.

* And must continue seised, or entitled, till the time of his death; 11 Mod. 28; Holt, 748; Bro. Abr. tit. Devise, pl. 16; 4 Burr. 1961; 8 Ves. 282.

† Upon a writ of error, in the House of Lords, this judgment was affirmed; 3 Bro. P. C. 19.

‡ And a term for years, purchased by a testator after the execution of his will, passes by it, because it is only a chattel real; and the will, in this case, operates as a testament, and not as a devise, either by the custom, or by the statute of wills; 1 P. Wms. 575; 3 Atk. 176; 6 Cru. Dig. 37.

§ The words used in the 34 & 35 H. 8. are manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder. In these words, every species of real property, whether corporeal or incorporeal, is included.

¶ Estates created by devise may be either legal or equitable.

Legal. As by devise of lands, or of an use, since the statute for transferring uses into possession.

Equitable. As first, by devise of an use before the statute for transferring uses into possession; secondly, by devise of a trust in equity.

First. By devise of an use; and it is clear that an use might have been devised previous to the statute of uses; Fitzh; Dev. 22; 30 H. 6.

As a devise of land supposes a consideration, it will lodge both the land and use in the devisee, if no use be limited upon it; and it cannot be averred to be to any other use than to the use of the devisee, for that would be an averment contrary to the design of the will appearing in the words of it. But if an use be expressed, it will enure to the use of *cestui*

1st. *Advowsons*.*

[106]

LAW V. THE BISHOP OF LINCOLN. M. T. 1779. C. P. 2 Bl. Rep. 1240. S. P. ante, vol. i. p. 311. S. P. id. p. 313.

W., by will, gave to J. L. the next turn or presentation of the church of G. The next presentation is devisable.† after the death of P. the then possessor, and after the death of J. L. to revert to the heir of P., the then possessor. It was contended by the heir at law of *que use*, and will be executed; for a devisee only has an implied use when no other is limited, and *expressum facit cessare tacitum*; 2 Vent. 312.

Thus where H. seised of lands held by knight-service, devised two parts of them to D. and his heirs, to the use of T., his brother, and his wife, and afterwards to the use of the said T. and his heirs males; it was agreed that a devise might be to the use of another; Hartop's case, Leon. 258; et vid. Moore. 107. So it is said, that if a man devise land to another in fee, he hath the use and title of it; but if it be limited to his use for his life only, the use of the fee shall be to the heir of the devisor; for, by the limitation, his intent shall be taken to be otherwise than it would have been taken if this limitation had not been; Popham, 4; Fitzh. Dev. 22. And the better opinion seems to be, that an use so devised will be executed by the statute 27 Hen. 8. of uses; 2 Ld. Raym. 875; Harg. & Butl. Co. Lit. 277. 278. Sid. 26. Those who entertain the contrary opinion contend that, as the statute of uses preceded the statute of wills, it could not extend to estates created under a power that had no existence until the latter statute imparted it; for, although it be true that as the statute of uses speaks of persons seised to uses by virtue of wills, yet this must have been applied to lands which were devisable by custom, as where a person seised of lands devisable by custom devised them to A. and his heirs, to the use of B. and his heirs; or to uses at common law; as where a feoffment was made to A. and his heirs, to the use of B. and his heirs, and B. devised the use. To uses of this description it is admitted the statute extended; but it is said to be difficult to conceive how uses created, under the testamentary power given by the statute of wills, can be within the statute of uses.

But if we consider that the statute of uses was a remedial law made to remove the many frauds and inconveniences that were incident to uses in the shape they assumed at that time, it seems by no means difficult to conceive that the benefit of it should in construction be extended to subjects not in existence at the time of the making of it, but which were, when introduced, obnoxious to similar mischiefs. It is perfectly clear from the provisions therein respecting uses created by will, that the legislature had that species of use in its consideration, and was of opinion that it was equally open to objection as those created in any other manner. The thing then respecting which this question arises, viz. uses created by wills, did exist at the time when the statute of uses was enacted, and was amongst those instances to which the remedies applied by the statute were pointed; the only question then seems to be, whether a statute made touching a certain thing may not be extended to another thing of the same nature, and in the same degree of mischief, though not existing until afterwards? Now instances of this kind are by no means unfrequent in our books.

Secondly—Through the medium of uses and trusts.

The distinction between an use, trust, or confidence executed by the statute 27 H. 8. (for all these terms are used to describe the beneficial interest meant to be operated upon by the statute,) and mere trusts not so executed, is, that in the former case by the words of the statute which are, "that any person who shall have any such use, &c. shall from thence forth stand and be seised, &c. of such lands, &c. to all intents, constructions, and purposes in the law, of and in such like estates as they had or should have in use or confidence of or in the same." By the force of which words the legal estate is executed, namely, transferred to the use, and the *cestui que use* has the legal estate in him in the same degree as before he had the use. the consequence of which is, that as to persons in *esse*, the legal estate becomes vested in them immediately as they come in *esse*, provided they come in *esse* in good time; and if they do not, then the estate goes over to the next remainderman in like manner as it would do in case of a common law-fee. Whereas in the latter case, viz. of a trust retained in equity, the legal estate still remains in the trustee, to serve support the trust according to the manner in which it is limited, and the intent of the donor.

The first idea of reviving uses under the description of trusts was conceived soon after the statute was passed, and arose from the following circumstances; 1 Anderson, 87; Bro. 340. It having been held that if one after the statute of uses, by deed indented and enroll-

* An advowson is included under the word tenement; Hob. 302. 304. And an advowson will pass by the description of all hereditaments situate, lying, and being in T, where the church lies; Dyer, 323; Pl. 30. But the same rule does not hold as to the word "lands;" 3 Atk. 460; unless the will would be otherwise inoperative; Sty. 261. 278.

It seems, however, questionable, whether an appropriation or the advowson of it will pass by the name of an advowson; Hob. 304.

† And by the devise of an advowson the next presentation passes. And the law is the same, although the devisor be himself incumbent of the advowson devised; 3 Bulst. 36; S. C. 1 Roll. Rep. 216; Cro. Jac. 371; 1 Atk. 619.

- [107] W. that this was only a gift to L. of the right of being presented himself, not of a right to present a stranger; and it was said, that in effect it was a devise to the heir at law, in trust to present the devisee to the next turn, and that the testator never meant to give the plaintiff a power of lapsing the living to the bishop; that the subsequent words of the devise, that the living should revert to the heir on the death of J. L., showed that J. L. was intended to be the person presented to the living; and that if he refused to take it, the heir might present another.

- [108] *Sed per Gould, Blackstone, and Nares, Js.* This is clearly a devise of a legal interest. There is no hint of any trust being reposed in the heir at law. The next presentation is devised in clear and explicit words; and consequently the devisee is clearly entitled to the first turn, and is not bound to present himself, but may give it to whom he will. And Mr. Justice Blackstone said, that he much questioned whether such a qualified right, as it was contended that the devisee took, could subsist at the common law. He said he was sure there was no remedy for it; for the *quare impedit* never named the clerk to be presented; it only removed the obstacle of presenting *idoneum clericum*, not A. B. and more especially not *seipsum*.

2d. Annuities.* 3d. Chattels real.† 4th. Commons.‡

5th. Contingent estates and interests.

1. SELWYN V. SELWYN. H. T. 1761. K. B. 2 Burr. 1131.

It was at one time supposed that no contingent estate could be the subject of a devise; but a different doctrine now prevails:||

A. B. was tenant for life with remainder to his son C. in tail. The father and son joined in a deed of bargain and sale, dated 20th April, 1751, to make a tenant to the *præcipe*, for the purpose of suffering a common recovery, the uses of which were declared to be to the father for life, remainder to the son in fee. Trinity term began that year on the 7th of June, and on the 8th, C., the son, or, before the statute, by deed, had bargained and sold his land to another in fee, to the use of the bargainee for life, &c. or in fee, to the use of a stranger, such use limited over was void; because the nature of the transaction and the price paid implied therein an use to the vendee, viz. the first *cestue que use*, and therefore, the limitation over to the use of another was repugnant; Dyer, 155, for, thereby, the use in fee, which was in the bargainee in respect of the consideration would be taken out of him, and carried over to another without a consideration; it became therefore a maxim in law, that an use or trust could not be limited out of an use or trust before limited. When this maxim was established, therefore, there was no idea that a second use or trust could have any effect; but if it were an use, trust, or confidence, it was executed by the statute; if it were not, it was a nullity. Therefore, on a limitation to A. and his heirs, to the use of B. and his heirs, in trust for D., B.'s estate was held to be executed by the statute, and D. took nothing. But although courts of law strictly adhered to this maxim, and sturdily refused to extend the operation of the statute of the 27 Hen. 8. beyond the first use, courts of equity were not so rigid; but, on the contrary, seized this opportunity to re-establish their jurisdiction over property, by giving effect to these uses or trusts, as affecting the conscience, and so the proper subject of the jurisdiction of the courts of equity. Therefore wherever an use or trust arises out of land, there the use will be executed by the statute, and the legal estate vested; but where the use arises out of a preceding use, which arises out of land, there the statute will not attach, and the use is retained by equity, under the denomination of a trust; 1 Powell on Devises, chap. vi.

* An annuity in fee is devisable: Co. Litt. 144.

† These may always be disposed of, provided the consent of the executors be first obtained; Plowd. 525; Wentw. Ex. c. 2. 19. But if a term be devised to A. for life, remainder to B., the assent of the executors to the devise to A. will operate as an assent to the devise over to B., and vest an interest in him accordingly; 10 Rep. 47. b.

‡ Commons *sans nombre* are not devisable; per Anderson, J. Cro. Eliz. 359; 2 Anderson. 22.

§ Fearne's C. R. 537; 9 Lev. 427.

|| But an estate that is turned to a right, as a reversion discontinued, is not within the purview of these statutes. Thus, where C. was tenant in tail, the reversion to R., and they joined in a lease for life by deed, and afterwards he in the reversion, during the lease for life, devised the reversion and died, and then tenant in tail died without issue: and the question was. Whether this devise was good or not: and this depended upon, whether, if tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so that it be a greater estate than tenant in tail can make, if it be a discontinuance of the tail only, or a discontinuance of the reversion also; and it was held to work a discontinuance in both, and then the deviser having nothing in the reversion but only a right, the devise was void; Cro. Car. 887. 405.

son, made his will, whereby he disposed of all his real estates. In the same term a writ of entry was sued out, returnable *quindn, trin.* which was the 17th of June, and the recovery was completed the said term. A. B., the testator, died soon after the return of the writ of entry; and the question was, whether the lands comprised in the recovery passed by the will, it having been made before the return day of the writ of entry. It was contended, that the testator had only a future executory use at the time of making his will, not a present use; for the statute could not draw the estate to the use, till the possibility, that is, the completion of the recovery, had actually happened; and that this future executory was not devisable. The court of King's Bench certified their opinion to the Court of Chancery, that the lands passed by the will. Lord Mansfield, in a subsequent case (1 Bl. Rep. 606.) is reported to have said, that if the practice of the Court allowed him to give his reasons, he was prepared to have shown, with the concurrence of his brethren, that all the contingent, springing and executory uses, where the person who was to take was certain, so that the same might be descendable, were devisable.

[109]

2. *ROE, D. PERRY, v. JONES.* T. T. 1788. C. P. 1 H. Bl. 31; S. C. 3 T. R. 88.

A special case disclosed that the testator had devised his dwelling-house, &c. to T. L., until T. L.'s youngest son J., or any other of his younger sons, should attain the age of 21; and, in case he should have no younger son who should attain the said age, but only one son that should arrive at 21; then, until such only son should attain that age, and when J., or any other of the younger sons of T. L. should attain 21, then he gave his said dwelling-house, &c. unto J., or such other son as for the time being should be a younger son of T. L., and should first attain 21 in fee. Testator died, leaving T. L., his heir at law, and T. and J., the sons, and only issue of T. L. J died under 21, and afterwards, T., in the life-time of his father, T. L. devised all his worldly estate, of what nature or kind soever: whether in possession, remainder, or reversion, that he should die seised or possessed of. &c. unto his wife in fee, and died; and afterwards T. L. died without further issue. After it had been resolved that T. had only a contingent executory interest in the premises, the question was, whether such an interest was devisable. And the Court, upon the authority of the cases of *Moore v. Hawkins*, 1 H. Bl. 33, determined that it was. In *Moore v. Hawkins*, testator devised his real estate in trust to his son J.; and that if he should die without issue under age, they should go to C. his heirs and assigns. C. afterwards devised all his estates whereof he was seised in possession, remainder, or reversion, and died in the life-time of J., who afterwards died under 21, and without issue. The Lord Chancellor said, he had never a doubt since he was 25 years old, that those contingent estates were devisable, notwithstanding some old authorities to the contrary; and he thought the point was now settled, and ought not to be shaken.

And in the case here a bridged, the Court, taking the interest in question, on a devise, to be a springing contingent executory one, were of opinion that it passed by the will.*

Upon this judgment, error being brought in the K. B., the Court said: the judgment for the plaintiff must be affirmed; because, if such an interest were descendible, it would be incomprehensible to say it was not devisable; they must both be governed by the same principle. It has been held to be descendible, because the person taking it has an interest in the lands which is known to the law, and will descend, if the ancestor does not dispose of it. There is a great distinction between a bare possibility and a possibility coupled with an interest; a bare possibility is that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere possibility of succession. Such a

[110]

* These cases have at length conclusively established the power of testamentary disposition over contingent and executory interests, but Mr. Ferme observes, in his *Essay on Contingent Remainders*, p. 371. "They do not appear to reach those cases, where neither the contingent interest itself, is transmissible from any person, until the contingency decides him to be an object of the limitation, nor the person or persons to or amongst whom the contingent or future interest is directed, is or are in any degree ascertainable before the contingency happens; as in the case of a contingent or executory limitation to the right heirs of J. S. then living, where the description of the person to take cannot be confined to, or among, any ascertainable person or persons during the life of J. S.; nor can it, therefore, be said, in whom such interest is, nor, consequently, that it is in any body during that period. Nor will be transmissible, or descendible, from any one before it becomes vested;" and see 2 M. & S. 165.

possibility is not the object of disposition; for, if the heir was to dispose of it during the life of the ancestor, such disposal would be void. *A possibility coupled with an interest* is like the present, and wholly different from the former. Let us consider a case. Suppose an estate be limited to A. for life, remainder to B. for life, and that the ultimate reversion in fee was given to another; it never was doubted but that such a reversion was devisable. Besides, the plain meaning of the statute of wills is, that every person who has a valuable interest in lands shall have the power of disposing of it by will.—Judgment affirmed.

6th. Corodies.* 7th. Copyholds.† 8th. Dignity, titles of.‡

9th. Entry, Right of.§

1. GOODRIGHT, DEM. FOWLER, v FORRESTER. T. T. 1807. K. B. 8 East, 552.

A mere
right of en-
try is not
devisable.

[111]

A. being tenant for life, with reversion in B. in fee, in 1734, levied a fine *surconuance de droit come ceo.* &c., with proclamations. In 1735, B. devised his reversion. The Court held that the fine had divested his estate, leaving in him only a right of entry; and the question was, whether it was devisable.

The Court said: we are of opinion it is not devisable; for such right is certainly not assignable by the common law; nor does it fall within the words of the statute 32 H. 8. c. 1. which are "*having manors, lands, tenements, or hereditaments*;" nor of the statute 34 and 35 H. 8. c. 5. s. 4. which are "*having a sole estate or interest in fee-simple of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, or remainder*." Now what description of *interest*, falling within these words, could the devisor be said to have had at the time of the devise. The opinion of Lord Eldon, in 8 Ves. jun. 282, was certainly against it; and Lord Thurlow, 1 Ves. jun. 255, supposed, in order to bring executory interests within the statute of wills, that they must have been considered as executed by the statute of uses, which is a different interest from a right of entry for the purpose of revesting a divested estate. See 8 Ves. jun. 282; 1 Bl. Rep. 606; Willes, 211; 3 T. R. 94; 1 Co. 85. b. 3 id. 32. a; 1 Mod. 17; 3 Ves. 699; 2 D. & R. 38.

2. GOODRIGHT, DEM. FOWLER, v. FORRESTER. E. T. 1809. Ex. Ch. Taunt. 578.

Sed quere

This is the preceeding case, which was brought here by a writ of error. The judgment of the Court of K. B. was affirmed, on the ground that, whether the will passed the right or not, it was barred by non-claim. But in the course of the argument, Sir J. Mansfield, C. J. suggested whether, as Jones v. Roe; 3 T. R. 83; S. C. 1 H. Bl 30; had, contrary to the old doctrine, established that executory interests were devisable, by analogy the interest in question, notwithstanding the early cases, would not be devisable also: it would, he said, be a singular construction at this day to say, that, upon the words of a statute, that enacts that persons, *having* lands, tenements, and hereditaments, may devise them; he who hath a reversion in fee, the highest estate in lands to be perfected merely by entry, cannot devise them. The policy of the old law was the fear of oppression, arising by grants of disputable titles. Where

* Corodies are not devisable; 1 Powell on Dev. Ch. iii.

† In the previous part of the abridgment (ante, vol. vi. p. 410.) it has been seen that copyholds were not devisable at common law, nor are they become so by the statutes of wills; 2 Roll. Rep. 383; Co. Rep. 50; Wood's Int. 138; for to pass copyholds by devise, there must have formerly been a surrender to the use of the last will and testament, which alone gave effect to the limitations therein. And when the uses were named in the will, they took effect by the surrender, and not by the will. This has been in some instances rendered unnecessary by the 55 Geo. 3. c. 192. as stated in a note, page 410 in vol. vi.

‡ Titles of dignity, while such titles were the consequence of territorial possessions; when the land was alienated, passed with it as appendant; and, consequently, where such land was devisable by custom, passed by such devise. But the dignity of the peerage having, after alienations grew to be frequent, been conigned to the lineage of the party ennobled, and held to be personal, instead of territorial, are not alienable by devise or otherwise. 1 Powell, Ch. iii.

§ The doctrine in question is very important, as affecting titles derived under testamentary dispositions; as whether the disseisee died seised or not, a will made by him before entry would be inoperative. Salk. 237. is to the contrary, where it is said the disseisee after entry, is seised ab initio; but see Lord Eldon's opinion, 8 Ves. 282. Cases certainly may happen where its application may be productive of much inconvenience; and Lord Ellenborough in Goodright v. Forrester, 8 East, 564. observed, it was a question peculiarly fit for the consideration of the legislature.

a man had a right of entry, on which there were doubts, or which he would not enforce himself, the law says it shall not be a subject of grant, but that does not show that it may not be well devised as descend, for the same reason of inconvenience does not apply. See 3 Ves. 669; 6 id. 282; 2 D. & R. 38.

10th. *Equities of redemption*.* 11th. *Fee-simple, in*.† 12th. *Franchises*.‡

13th. *Lives, estates for*.§ 14th. *Manors*.|| 15th. *Mortgages*.**

16th. *Offices*†† 17. *Possibilities*.

JONES, D. PERRY, v. ROE H. T. 1739. K. B. 3 T. R. 88. 1 H. Bl. 30. S. P.

BUNKER v. COKE. H. T. 1706. K. B. 11 Mod. 106; S. C. 1 Salk. 237.

S. P. LOVE v. WYNDHAM. 1 Mod. 50.

Per Cur. Although a bare possibility is not devisable, a possibility coupled with an interest is.

18th. *Powers*.a 19th. *Rents*.b 20th. *Tithes*.c 21st. *Trust Estates*.d

22d. *Ways*.e

(D) THAT THE DIRECTIONS POINTED OUT BY THE STATUTE OF FRAUDS BE ATTENDED TO.f

* An equity of redemption, being in some respects similar to a trust estate, has always been considered devisable; and in Ch. Ca. 101. it was determined by the Court of Chancery, that where a person seised in fee had mortgaged his estate, and afterwards devised it, the equity of redemption shall go to the devisee, not to the heir.

† Not only estates in fee-simple absolute, but also determinable fees, and base fees, are devisable under the statute of wills, the term fee-simple being taken in its most extensive sense; 3 Bulst. 184.

‡ Franchises, which are not of an annual yearly value, cannot be devisable; but franchises of a certain value, and not restrained to the person of the grantee and his heirs, may be devised; 1 Inst. 111. b.; 3 Rep. 32. b.; Franchises, though not of an annual value; 3 Rep. 32. b.; 6 Cru. Dig. 28.

§ The statute 34 and 35 H. 8. only extend to estates in fee-simple, and therefore did not enable persons to devise estates which they held pour auter vie; see Carter, 208. 311; Poph. 91, 92; Dyer, 253; Pl. 49; 1 Roll. Abr. 314; Salk. 619; 2 Ld. Raym. 776; Co. Litt. 18. a, 10 Rep. 95; Cro. Eliz. 41; Palm. 32; 1 Saund. 261. But now it is enacted by the 29 Car. 2. c. 8. s. 12. that estates pour auter vie may be devised by a will in writing signed by the party so devising the same, or by some other person in his presence, and by his express directions, and attested and subscribed in the presence of the devisor by three or more witnesses.

This kind of interest per auter vie may be entailed, and admits of a limitation over by way of rent; 3 Will. 262; 3 Bro. P. C. 50; but which may be barred by conveyance or contract; 3 Bro. P. C. 50; 1 Atk. 555; 2 Vern. 225.

|| Manors may be devised either by custom or by the express words of the statute of wills; 3 Rep. 32. b.

** If a mortgagee devises the lands mortgaged, before the condition is broken, it will be void, because a condition is not devisable. But an estate in mortgage may be devised after the condition is broken; and in such a case, if the devisee exhibits his bill against the mortgagor to foreclose him, a decree will be made accordingly; 6 Cru. Dig. 27.

†† Offices, being annexed to the person, are not devisable, 1 Powell on Dev. Ch. iii.

a The power of devising extends not only to the several actual legal estates or interests in things real, but also to authorities over such estates or things. The learning connected with the creation of powers by will, their subsequent execution, and their construction in law and in equity, will be reserved until the title with which they are so intimately connected is noticed.

b Rents are devisable either by the custom, or by the express words of the statute 34 Hen. 8; and where lands are devisable by the custom, rents out of them follow the nature of the reversion or seignory to which they are incident, and are devisable likewise; Litt. s. 585; Cro. Eliz. 805; 3 Rep. 33. b.

c Tithes, of which a man is seised in fee, may be devised as hereditaments; Swinb. 140; Sty. 251.

d As uses were the medium through which lands were originally devisable, so trust estates, which in fact are uses not executed by the statute, are now devisable; but where a person has only an equitable interest in lands, his devise of them amounts to no more than a direction to those who have the legal estate in trust for him to convey it according to the devise; 2 P. Wms. 258, 6 Cru. Dig. 24.

e Ways are not devisable; Cro. Eliz. 359; 2 Anders. 22.

f The clause in the statute 29 Car. 2. c. 3. that relates to the subject, has for its object the adding such solemnities to the publication of wills as the legislature conceived best calculated to guard men in extremis against frauds, and to protect the legal heir from being disinherited by instruments executed by those, whose bodily strength might be sufficient to enable them to set their marks to depositions of their property, the object of which their mental faculties were too weak to comprehend. And, with this view, "it is enacted, that all

A possibility coupled with an interest is devisable.

[113]

[112]

[114]

1st. *In What cases requisite.**2d. *What these directions are.*

devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute (statute of frauds), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or more creditable witness, or else they shall be utterly void and of no effect."

* The first material words in the clause are those which refer to the instrument, that it is the particular object of the legislature to regulate, viz. "all devises and bequests;" upon which it is observable, that the legislature has not in this statute, as was likewise the case of the statutes of 11 L. 8. prescribed any particular form of words in which an instrument, purporting a devise, should be conceived. From hence it follows, that any paper writing, which would have constituted a valid devise before the statute of frauds, will be equally valid, as such, since the making of that statute, if the forms and solemnities required thereby attend its publication; 2 Atk. 368; 1 Powell on Dev. ch. iv.

The next material words in this clause are those, which are descriptive of the subject matter upon which the enacting part thereof is to operate, viz. "of any lands and tenements." It has been determined that all devises by which terms for years, or other interests arising out of lands, are created; or by which powers to sell or charge lands are given, are within the statute. Therefore, where an estate is devised for a term of years, or a sum of money is given originally out of land, a will containing such a charge must be executed in the manner prescribed by the statute; because it is the same as a devise of the land, since the term of years is an interest in the land, and money thus given can only be raised by a mortgage or sale of the land; 2 Atk. 272; 2 Ves. 179. There is one exception to this rule, which has been already mentioned, namely, where a will duly executed according to the statute of frauds contains a general charge on the testator's lands, in aid of his personal estate, it will extend to legacies given by a subsequent will or codicil, not duly attested; 1 Eq. Ca. Abr. 409. But if a person, by a will duly attested, charges his real estate with such legacies and annuities as he shall afterwards give and charge upon that estate, whether attested or not, a charge by an unattested codicil will not be good; 12 Ves. 29. Although a trust estate is now what a use was before the statute 27 H. 8. yet it is settled that it can only be devised by a will executed according to the statute of frauds; 2 P. Wms. 258; 3 Atk. 151. An estate in mortgage, though only held as a pledge for securing the repayment of money borrowed, can only be devised by a will executed according to the statute of frauds; 6 Cru. Dig. 72. The same rule applies to an equity redemption, which is considered as real property, and similar to a trust estate; id. Some modern writers, says Mr. Cruise (6 Dig. 72), have asserted that where a mortgagee disposes of money due to him on a mortgage, by an unattested will, the legal estate in the lands comprised in the mortgage will pass. I can find no authority for this opinion; and I apprehend that not ing more than the money would pass; with a right in equity to call on the heir of the mortgagee for a conveyance of the land. The statute of wills does not extend to copyhold estates; the power of devising them was indirectly exercised by means of a surrender to the use of a will; and it has been determined that in those cases, a will made in pursuance of such a surrender need not be executed according to the statute of frauds, because the copyhold passes by the surrender, not by the will; which is only a declaration of the uses of the surrender; 6 Cruise's Dig. 73. As terms for years already created were disposable by testament before the statute of wills, they are not comprehended within the statute of frauds, and may therefore be disposed of by any kind of will or testamentary disposition; but a term for years in lands cannot be created by a will which is not executed according to the statute of frauds; 6 Cru. Dig. 74. If, however, a term of years becomes attendant on the inheritance, it is then considered as part of the inheritance, not a chattel real, and can only be disposed of by such a will as would pass the inheritance; 2 P. Wms. 226. A will made in a foreign country of lands situate in England must be executed in the same manner, and attested by the same number of witnesses, as a devise of lands made in England; 3 P. Wms. 202. And hereupon it has been determined (2 P. Will. 75.) in the case of a devise of lands at Barbadoes, that this statute does not extend to such of our colonies and plantations as were in possession of previous to the time of its passing; the principle of which decision is, that if there be a new and uninhabited country found out by English subjects, as the law is the birth right of every subject, they, wherever they go, carry this law with them; and, therefore, such new-found country is to be governed by the laws of England; but, after such new country is inhabited by the English, acts of parliament, made in England without naming the foreign plantations, will not bind them. Nor is Bermuda within the statute, having become an English colony in 1609; *Goderice v. Sheldon*, 8 Ves. 481. The provisions of the statute of frauds, relating to the execution and attestation of wills, have been however adopted in many of the British colonial possessions. They are in force in St. Kitts; *Beckett v. Marsden*, 4 M. & S. 1; and the statute has also been introduced into Grenada; *Attorney General v. Stewart*, 2 Mer. 145. n.

1. *That the devise be in writing.**

2. *That it be signed.†*

1, LEMANE v. STANLEY. E. T. 1681. K. B. 3 Lev. 1. S. P. HILTON v. KING. 3 Lev. 36.‡

A person wrote his will with his own hand, beginning thus: "I, John Stanley, mak this my last will and testament," and put his seal, but did not subscribe his name to it. This was adjudged to be a good will; for, being written by himself, and his name in the will, it was sufficient signing within the statute, which did not appoint where the will should be signed, at the top, bottom, or margin; and, therefore a signing in any part was sufficient. And three of the Judges were of opinion, that the putting his seal had, of itself, been a sufficient signing within the statute of frauds; for *signum* was no more than a mark that it was h.s. will.§

* Though this be the first solemnity required by this statute in the making a will, it was, in fact, an unnecessary provision as to all lands, except those which were devisable by custom or otherwise, previous to the statute of wills; devises of lands made devisable by the statutes of wills being thereby required to be in writing. It applies, therefore, particularly to land of the former description, which, being left by the statutes in the same situation in which they were at common law, continued, were so authorised by custom, devisable by parol; Shepwith's case, Godb. 14, 15. And, to prevent the frequent perjuries which were committed by putting words into testator's mouths that had never been spoken by them, it enacts generally, that all devises shall be in writing; 1 Powell on Devises, ch. 4.

They must also be reduced into writing in the life-time of the devisor; for it is not sufficient that it be put into writing after his death, being first declared by words only, for then it is but a nuncupative will. It is not material upon what matter or stuff, whether paper or parchment; or in what language, whether English, Latin, French, &c., or in what kind of hand writing or character, a devise is written, so that it be fair and legible, and the meaning be sufficiently apparent. Neither is it material whether it be written large, or by notes usual or unusual; or whether sums of money given be expressed at full length, or in figures, provided it be free from all doubt and ambiguity; 6 Cru. Dig. 48.

† This solemnity was inserted in favour of persons who, by accidents, had lost their hands, or who, by blindness, palsy, or other diseases incident to the human frame, were incapable of performing this ceremony themselves. The ceremony of signing, used by the civil law, seems to have been chosen rather than that of sealing and delivering, which was the feudal solemnity attending the execution of deeds; because the seal, which had been formerly a great mark of distinction among families, was not so at the time of this statute's being passed; and the form of sealing and delivering had not so great a tendency as signing to effect the great purpose of this clause, the discovery and prevention of frauds; Gibb's Eq. Rep. 262; 1 Powell on Dev. Chap. iv.

‡ In which case, North and Levinz, Justices, held, that it was not material whether the signature was at the top or bottom of the will or writing, as the statute does not say subscribed, but signed by the testator. The principle of Lemayne v. Stanley has been recognized as established law, in many subsequent cases; Grayson v. Atkinson, 2 Ves. sen. 454; also Coles v. Trecothick, 9 Ves. 249. And Lord Eldon lately observed, that "Lord Hardwicke intimated a very clear opinion that, if a testator with his own pen says 'I, A. B. do make this my last will and testament, &c.,' and acknowledges it before witnesses, that is a good execution: and that the case in Levinz cannot be sustained, unless you add one or two circumstances, either that the witnesses were present when he was writing the will, which, Lord Hardwicke observes, was not a natural presumption, or, if they were not present, that he acknowledged it to be his writing, when he called them in to attest it; certainly expressing his opinion that such acknowledgment would do;" see Morison v. Tournour, 18 Ves. 183. In a late case in Ireland, the attestation clause, subscribed by three witnesses, was as follows: "signed, sealed, published, and declared by the testator, in the presence of the witnesses; and when it was declared by him as part of his will, that he gave and bequeathed the reversion of the lease to D. to his eldest son John," Lord Mannors, C., was of opinion that this could not operate as a devise, for want of being signed by the testator. This was so clear, that the counsel for the devisee was obliged, in support of their arguments, to resort to the cases before the statute of frauds; Blennerhasset v. Day, 2 Ball. and Beatty, 104; 1 Powell on Dev. by Jarman, p. 75. n.

§ But this doctrine appears to have been very much doubted in a subsequent case, Smith v. Evans (1 Wils. 8:3. *et vid.* Gryle v. Gryle; 2 Atk. 182.), in which Lord Chief Baron Parker, Baron Clive, and Baron Smith, (*absente Legg*) are reported to have said, that what is said by North, Wyndham, and Charlton, in 3 Lev. 1 viz. "that putting a seal to a will is a sufficient signing within the statute of frauds," is a very strange doctrine; for that, if it were so, it would be very easy for one person to forge any other's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand. And the barons said, that if the same thing should come in question again,

[115]
If the testa-
tor's name
be written
in any part
of a will
either at the
beginning
or at the
end, it will
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be consider-
ed as a suf-
ficient sign-
ing within
the statute.

2. RIGHT v. PRICE. M. T. 1779. K. B. Dougl. 241.

But if the
devisor in-
tend to sign
the instru-
ment in
form, and
begins so to
subscribe
his name,
but he
comes inca-
pable of do-
ing it, this
will not be
a signing
within the
the act.

A will was prepared and written on five sheets of paper, and a seal affixed to the last, and also the form and attestation written on it. The will was then read over to the testator in the presence of three witnesses, who afterwards subscribed, and the testator set his mark to the two first sheets in their presence, and attempted to set it to the third, but, being unable, from the weakness of his mind, he said, "I cannot do it, but it is my will." After this, the three witnesses went away, being desired to come again. The testator died without setting his mark to the last three sheets. Lord Mansfield said, the will was not duly executed; for, when the testator signed the two first sheets, he had an intention of signing the other two sheets, but was not able; he therefore did not mean the signature of the first two sheets as a signature of the whole will; there never was a signing of the whole. The Court, to be sure, would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with; but, here, there was no room for presumption.—Adjudged that the will was not duly executed.

3. WINSOR v. PRATT. E. T. 1821. C. P. 2 B & B. 650; S. C. 5 Moore, 484.

Such inten-
tion must,
however ap-
pear.

This will was written on three sides of one sheet of paper; it concluded by stating that "the testator has signed his name to the two first sides thereof, and his hand and seal to the last." It was duly attested by three witnesses. It appeared, however, that he had put his name and seal to the last side only, but had omitted to sign his name to the two first sides. The Court were of opinion that the will was well executed. Whatever might have been his intention, at one time, of signing the former sheets, by his final signature he had abandoned that intention.

3. That it be attested.*

(a) What is sufficient.†

1. In general.

1. PEATE v. OUGLY. H. T. 1709. K. B. Com. 197. S. P. Skin. 227.

A devise
must also
be attested

Action of ejectment. It appeared in evidence, that the instrument was they would not hold that sealing a will only was a sufficient signing within the statute; and see 2 Ves. sen. 458; 1 Ves. 11, 17.

It is clear that a mark is a sufficient signature by a testator under the statute; 8 Ves. 186; 17 Ves. 458. In Lemayne v. Stanley, as reported in Freem. 538. ca. 724. a name impressed with a stamp is said to be good.

* In the construction of the statute of frauds on this point, it has been held that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for it was not merely the abstract act or form of signing that the legislature required as one necessary solemnity to the constitution of a devise, for an idiot or lunatic might put his name to an instrument; and yet be perfectly ignorant of its contents; but the legislature, in the word "signing," comprehended another idea, namely, signing an instrument intending to be a will; consequently, the mental power or capacity of willing was necessary, as well as the corporal power of putting the mark or name, to constitute a signing. The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to try, judge, and determine, whether the testator is *compos* to sign; Harris v. Ingledew, 2 P. W. 93; Camd. Arg. 23; 2 Atk. 56. 8. And see Skin. 237; Prec. Ch. 184; 2 P. Wms. 506; 2 Ves. jun; 455; 3 P. Wms. 253; 2 Atk. 182; Dougl. 144; 8 Ves. 504; 1 Ves. & Bea. 362:

† A devise must also be published, that is, the devisor must do some act from which it can be concluded that he intended the instrument to operate as a will or devise. And Lord Hardwicke has mentioned a case (3 Atk. 161.) where, upon trial at bar in the Court of K. B., the question was, whether the testator had published his will, for there was no doubt of his executing it in the presence of three witnesses, or of their having attested it in his presence, which showed that publication was in the eye of the law an essential part of the execution of the will, and not a mere matter of form. The words "signed and published by the said A. B. as and for his last will and testament" are a sufficient publication; 1 Com. 196. A will was delivered by a testator as his act and deed, and the words "sealed and delivered" were put above the place where the witnesses were to subscribe. It was adjudged that this was a sufficient publication; 4 Burn's Eccl. L. 119.

In Moodie v. Reid, 7 Taunt. 361. Gibbs, C. J., appeared to be of opinion that publication was not an essential part of a will, not being, as he conceived, necessary to devises by custom at common law, nor made so by the statute of H. 8. and Car. 2., but this was an *obiter dictum*, unappealed for by the subject before the Court.

written by Oliver St. John, Earl of Bolingbroke, the devisor. These words were also written in his hand-writing, viz. "Signed, sealed, and published, as my last will and testament, in the presence of," and then the names of the three witnesses were subscribed: two of them were dead; and the third, who was produced at the trial, deposed, that he had been a servant to his lordship, and that 28 years before, he and the other witnesses were called upon in the night and ordered into the Earl's chamber, who produced a paper folded up, and desired him and the others to set their hands to it as witnesses, which they did in his presence; but he deposed, that they did not see any of the writing, nor did the Earl tell them that the instrument was his will, or say what it was, but believed this to be the paper, because his name and those of the other witnesses were to it; and he had never witnessed any other paper for the Earl, but that he had often seen the Earl write, and believed the whole of the instrument to be of the Earl's writing. And it was objected that this will was not good, within the statute of Charles 2.; for, that required the witnesses to attest the signing by the devisor, or, at least, the publication of the will; neither of which had been done in this case. But, it was replied, that it was well executed; for, that it was sufficient if the testator wrote these words: "signed, sealed, and published, as his will," and requested the witnesses to subscribe their names to it, and that they need not hear the devisor declare it to be his will. And a case was cited, determined by Lord Shaftsbury before the statute, where a man, having written a will with his own hand, and also these words, "signed and published in the presence of," and no witness had subscribed it, it was held well published. And, in the principal case, Lord Ch. J. Trevor inclined to think that the evidence was sufficient to find it well executed; and the jury found it accordingly. However, it seems doubtful whether there must be an actual acknowledgment of the signing to one of the witnesses to warrant the attestation; for, it is said, in the case of Stonehouse and Evelyn, 3 P. W. 254. that it is sufficient if one of the three witnesses swears that the testator acknowledged the signing to be his own hand; from whence, it seems a necessary inference that such an acknowledgment, at least, is necessary to support the attestation; 1 Powell on Div. ch. iv.

2. BOND V. SEAWELL. M. T. 1766. K. B. 3 Burr. 1773; S. C. 1 Bl. Rep. 407.

A. B. made his will, consisting of two sheets of paper, all in his own hand-writing, and signed at the bottom of each paper. The sentences and words were so connected from the bottom of each page to the top of the next, and particularly from the fourth side of the first sheet to the first side of the second sheet, that they were imperfect and nonsensical if read apart; but clear and intelligible when read together. He also made a codicil in like manner on a single sheet. The testator then called in C. D., showed him both the sheets of the will, and his signature to every page, told him that was his will, and also showed him the codicil, and desired him to attest both, which he did on the last sheet of the will, and on the codicil, in the presence of the testator, and then left the room. E. F. and G. H. came in immediately afterwards: the testator showed them the codicil and the last sheet of the will, and sealed them in their presence; took each of them up and severally delivered them as his act and deed. These witnesses then attested the same in the testator's presence; but never saw the first sheet of the will, nor was it produced to them, nor was the same or any other paper on the table. After the testator's death, both sheets of paper were found in his bureau, not pinned together, but wrapped up together, with the codicil, in one piece of paper. The question was, whether the will was duly attested according to the statute of frauds. The case was several times argued before all the judges in the Exchequer Chamber; and Lord Mansfield acquainted the bar that there had been a conference among all the judges, except Mr. Baron Adams, upon this case, which was an amicable suit to try the real merits of the question. It occurred to the judges, that the way in which the parties had put the case did not go to the merits; because, if the first sheet was in the room at the time when the latter sheet was

and sub-
scribed by
three or four
witnesses in
testator's
presence.
Where the
testator
owns his
[118]
handwrit-
ing, it is
sufficient,
though they
do not see
him sign his
name; and
it has even
been doubt-
ed whether
an actual
acknowledg-
ment of
signature
by a devi-
sor was ne-
cessary.

The witness
ought to
see the
whole will.
The pre-
sumption
however is,
that all the
sheets on
which a will
is written
are in the
room where
the witness
es attest.

[119]

executed and attested, there would remain no doubt of its being a good will, and a good attestation of the whole will; but, if the whole sheet was not then in the room, a doubt might arise whether it was or was not a good attestation, as to the real estate. However, no opinion was given or formed by the judges upon such doubt which might so arise, if it should appear that, in fact, the first sheet was not then in the room. A will properly attested might, by reference to another instrument, establish particular clauses, so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will verbatim; and there were references in this will from one part to another. Every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention. It was not necessary that the witnesses should attest every page, folio, or sheet; or that they should be particularly shown to them. This had been settled; but the fact, whether the first sheet of the will was or was not in the room at the time of the executing and attesting the latter, might be material to be known; if it was, the jury ought to find for the will generally; and they ought to find all things favourable to the will. If it was doubtful whether the first sheet was then in the room or not, they all thought the circumstances sufficient to presume that it was in the room, and that the jury ought to be so directed; but, upon a special verdict, nothing could be presumed; they were all of opinion that it ought to be tried over again; and, if the jury should be of opinion that it was then in the room, they ought to find for the will generally; and they ought to presume from the circumstances proved that the will was in the room.

3. *SHIRES v. GLASCOCK*. E. T. 1687. C. P. Salk. 688.

A testator desired the witnesses to go into another room, seven yards distant, to attest his will, in which there was a window broken, through which the testator might see them; and it was held that this will was well attested, according to the statute; for it was sufficient that the testator might see the witnesses, and not necessary that he should actually see them; for, in that case, if a man should turn his back, or look another way, it would vitiate the will. So, if the testator, being sick, should be in bed with the curtains closed. See 6 Dow. 202; 1 P. Wms. 239; 1 Bro. R. 99.

4. *DAVY v. SMITH*. E. T. 1692. K. B. 3 Salk. 395.

The testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open, so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did see them subscribe; for it was possible that the testator might have seen them subscribe.

4. *DOE, D. WRIGHT, v. MANTFOLD*. E. T. 1813. K. B. 1 M. & S. 291.

The attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room; and the jury found that, from one part of the testator's room, a person, by inclining himself forwards, with his head out at the door, might have seen the witnesses; but that the testator was not in a situation in the room that he might, by so inclining, have seen them. The Court held, that the will was not duly attested, and said: it is not necessary that a deviser should actually see; but the question is, whether he must not be in such a situation that he might see the witnesses attest. I am old enough to remember the decision of *Casson v. Dade* (1 Bro. C. C. 99:) upon that point, and afterwards went to view the office, through the window of which it was proved that the testatrix, who sat in her carriage when the will was attested in the office, might have seen what was passing there. In favour of attestation, it is presumed that if the testator might see, he did see. But I am afraid that, if we get beyond the rule, which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to

* But where the witnesses subscribed their names at a window, in a passage where they could only see a part of the bed on which the testator lay, and he could, as he lay there, see them attest the will, held not to be duly executed; 4 Bro. P. C. 71.

So, the courts have liberally expounded the words "in the presence," by holding them as synonymous with "with in the view."

And by presuming that [120] if the testator might have seen, he did, &c. Where, therefore, a testator was in a room, from one part of which he might, by inclining his head in to a passage have seen the witnesses attest the will, but not in the situation in which he was, the will was held not to be well executed.*

an attestation out of the deviser's presence; a to which this rule is, that where the deviser cannot, by possibility, see the act doing, that is out of his presence.

5. *ECCLESTON v. SETTY*, *alias SPEKE*. M. T. 1688. K. B. Carth. 79; S. C. Com. 156; S. C. 1 Show 89. S. P. *BRODERICK v. BRODERICK*. 1 P. Wms. 239.

On a trial at bar, the defendant in ejectment claimed under a will duly executed according to the statute of frauds, and the plaintiff, in order to set aside that will, produced a subsequent one, subscribed by three witnesses, who themselves proved that the testatrix signed it in their presence, but that they did not subscribe it in her presence; for that she signed it in her bedchamber, and they subscribed it in the hall; and that it was not possible, from her chamber, to see what was done at the table in the hall, there being a passage, and eight or ten turning stairs, between those places; and that the testatrix continued in her chamber all the time the witnesses were subscribing. The Court were of opinion that, as to the devise of lands, the latter will was void for this defect.

But testator must be in such a position, that he may, if he please, see the witnesses subscribe, without changing his position;

6. *MACHELL v. TEMPLE*. E. T. 35, Car. 2. K. B. 2 Show. 288.

In this case there was a deed of settlement, with power to revoke by any deed, &c., or by last will and testament. The party made a will, and published it in the presence of three witnesses; but he being sick, and there being so great a company in the room that the noise thereof disturbed him, he desired them to go to the next room to subscribe their names, which they did. And one question was, if this were a good will within the statute, it requiring that the witnesses should sign it in the presence of the testator. The Court and counsel agreed upon a special verdict; but the jury found for the plaintiff, who was heir at law, saying, they were all of opinion that it was not a good will.

And though the retiring of the witnesses be by desire of the deviser, it will make no difference.*

7. *RIGHT, D. CARTER, v. PRICE*. M. T. 1779. K. B. 1 Doug. 241.

And he must, of course, be in a state of sensibility.

Per Cur. If a testator be in a state of insensibility when his will is attested, the will is not duly executed, according to the meaning of the statute of frauds, although he be corporally present.

8. *HANDS v. JAMES*. E. T. 1737. C. P. Com. 531. S. P. *BRICE v. SMITH*. Willes, 1. S. P. *CROFT v. PAWLET*. E. T. 1740. K. B. 2 Str. 1109; S. C. 8 Vin. Ab. 128. pl. 14.

In ejectment by an heir at law, the question for the opinion of the Court was, if it should be left to a jury to determine whether the witnesses to a will being all dead, set their names in the presence of the testator; and this merely upon circumstances, without any positive proof. The Court said this was a matter fit to be left to a jury. The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testatrix; but it was not required by the statute that this should be taken notice of in the subscription to the will; and whether intended or not, it must be proved; if inserted, it did not conclude, but it might be proved *contra*, and the verdict might find it *contra*. Then, if not conclusive when inserted, the omission did not conclude it was not so; and therefore must be proved by the best proof which the nature of the thing would admit of. In case the witnesses were dead, there could not probably be any express proof; since, at the execution of wills, few were present but the deviser and the witnesses. Then, as in other cases, the proof must be circumstantial; and there might be circumstances to induce a jury to believe that the witnesses set their hands in the presence of the testatrix, rather than the contrary; and it being a matter of fact, was proper to be left to them. The plaintiff was nonsuited.

The facts necessary to a valid execution need not, however, be set forth in the attestation; nor if stated, is the statement conclusive.†

* And a devise, even if it be executed in the room where the testator is, and may see it, if he please, will, if the subscribing be done in a clandestine and secret manner, be void; 1 P. Wms. 740.

† In *Lord Ranelagh v. Lady Parkins*. 6 Dow, 202. Lord Eldon said, if it be proved that they, (the witnesses) did actually sign in the testator's presence, the not recording that circumstance will not vitiate the will, but when the will is produced in a court of justice, it is necessary that the proof should be made; and if it were necessary for the decision of the question, it would be sent to a court of law.

9. *LEA V. LIBB.* H. T. 1686. K. B. Carth. 35; S. C. Ca. T. Holt, 742; S. C. Comb. 174

It is not sufficient that [122] the witnesses to a will and codicil aggregately make up the numerical requisition of the statute.

D. by his will in writing, devised that his lands should be sold, which will be signed and published in the presence of two witnesses: viz. W. and B., who attested and subscribed the will in the presence of the testator. About a year afterwards D. made another writing, by which he revoked a legacy given by his will, and gave a new legacy, and also thereby declared that his intent was that his will should be ratified and confirmed in all things except as he had altered it by that writing, and that this codicil should be accepted and taken as part of his will. This codicil was signed and published in the presence of two witnesses only; viz. B. who was a witness to the will, and H., who was a new witness. At the time of making the codicil, neither the first will, nor the last witness thereto, viz. W. were present, and the codicil was separate and never annexed to the will. The question was, whether, by this will, signed and attested as above, the lands were well devised within the statute of frauds. The Court held that the will and the codicil together were not sufficient to pass the lands; for that the statute of frauds expressly required three witnesses to every will by which lands were devised; that a certain method was pointed out thereby, which every person in making a will ought to pursue, to prevent fraud; consequently those who would have the benefit thereof, ought to adopt the means thereby prescribed, which was not done in this case; because H., who was witness to the codicil only, could not thereby become a witness to the will. And Holt, C. J., argued that if lands had been devised by the codicil, such devise would certainly have been void, not being sufficiently attested; because one of the witnesses who subscribed the will was in no wise concerned touching the codicil, and one of the witnesses who subscribed the codicil was in no wise concerned touching the will. See *Prec. in Ch.* 270; S. C. *Gilb. Rep.* E. 5; 3 *Rep. Ch.* 156; 2 *Vern.* 597.

2. *When there are separate instruments.*

CARLETON V. GRIFFIN. E. T. 1759. K. B. 1 *Burr.* 549; S. C. 2 *Ld. Kenyon*, 281.

It was formerly* held that every will and every codicil must be separately attested by three witnesses; but that is no longer law; and it has been also held, that there may be several signings by testator, and but one attestation.

A. B., on the 2d of May, 1752, wrote upon a sheet of paper, with his own hand, as follows: "Know all men by these presents, that I, A. B., make the afore-mentioned my last will and testament." He then proceeded to give two freehold houses, and subscribed it; but there was no witness. In January, 1754, he wrote on the same sheet of paper the following words: Memorandum, "Whereas I have laid out, &c. on a lighter, &c. and the barge called the Lemon, &c. all shall be at my wife's disposal; and this not to disannul any of the former part made by me, the 2d May, 1752, except that my wife shall not be liable to pay to my son John, &c. Witness my hand, A. B." The will was written on the first and second sides of a sheet of paper, and the memorandum was begun either upon the end of the second, or the beginning of the third, and written upon the third side; and all the second writing related only to the personal estate. The testator subscribed this in the presence of three witnesses; then he took the said sheet of paper in his hand, and declared it to be his last will and testament in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence; which they accordingly did. The question was, whether this will was duly attested according to the statute of frauds.

Lord Mansfield said, the case was accurately put; for it was not stated to be either a will or a codicil, but a sheet of paper written, &c. At first, in 1752, the testator did not know that any witnesses were necessary; in 1754 he found they were necessary; then he made a subsequent disposition, which was a memorandum to be added to it; but he did not call it a codicil, nor did the case state it to be so. He plainly considered the whole as one entire disposition, and he expressly declared in the latter, that he did not thereby mean to disannul any part of the former devise or dispositions. There is not a tittle

* *Rep. Temp.* Holt, 742; *Gilb. Rep.* 5. *Pre. in Ch.* 270; 2 *Ves. jun.* 228; 3 *Barr.* 1785; 16 *Ves.* 167; 1 *Ves. & Bea.* 445.

in the latter that relates to the real estate; therefore, the only intent of having the three witnesses was, and must be, to authenticate the former. Then the publication of it was, as of a will; he took up the sheet of paper and said, "it is my will;" and certainly he did not mean a part only, but the whole of it; and he desired them to attest it: all this must relate to the whole that was written on the paper.

(b) *At what time attestation should take place.**

(c) *As to who may be witnesses.†*

1. HILLIARD v. JENNINGS. T. T. 1701. K. B. Com. Rep. 91; S. C. 1 Freem. 510; 1 Lord Raym. 505.

A. B. devised lands to C. D. and his heirs; C. D. was one of the three attesting witnesses. The Court held that this will was not executed according to the statute.

2. ANSTEE v. DOWSING. E. T. 1747. K. B. 2 Stra. 1253.

In this case T. demised the lands in question, and charged all his real and personal estate with annuities and legacies, and particularly with an annuity of 2*l.* per annum to E. the wife of H. for her life, and to her separate use; and also gave a legacy of 10*l.* each to H. and his wife for mourning. To this will there were three witnesses, whereof H. was one. They were all living, as was also the wife of H. The devisee, before and at the trial, made a tender to H. of 20*l.* for his and his wife's legacy, which he refused to accept, and those legacies, at the time of the trial were not discharged. Lord Chief Jus-

They must be according to the words of the statute, "credible."

[124]

A question arose as to whether noncredibility could be purged by any matter *ex post facto*.

* Although the subscription by the witnesses need not be simultaneous; Anon. Ch. Ca. 103; 2 Vern. 429; Prec. Ch. 104; yet it is the safest way to execute the will in the presence of all three witnesses, who should severally sign the attestation in the presence of each other. Though this is not required by the statute, without these precautions it would be impossible to prove the will, without the testimony of all the attesting witnesses; and if the witness, or witnesses, who attested separately, should happen to be dead, or could not be found, it might be difficult, under such circumstances, to prove the execution at all; besides, if any of the witnesses, in such case, swear that the testator was not sane, or either of them deny his own hand-writing, great difficulty may occur in establishing a will so circumstanced; 1 Powell on Dev. chap. iv.

† By 25 Geo. 2. c. 6. s. 1. it is enacted, that if any person attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made; such devise, legacy, estate, interest, or appointment, shall so far only as concerns such person attesting the execution of such will, or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil. In case (by section 2), by any will, or codicil, any lands, tenements, or hereditaments, shall be charged with any debt or debts; and any creditor whose debt is so charged, shall attest the execution of such will, or codicil; every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act; see vide 3 Addams, 210.

‡ Two celebrated cases have been decided respecting the competence and credibility of witnesses to a will. The first is that of Wyndham v. Chetwynd, in the Court of King's Bench, 1 Burr. R. 414; and the second is that of Doe, ex. dem. Hindson, v. Kersey, in the Court of Common Pleas, but as they relate to wills made before this statute, it is unnecessary to state them in the text. The facts disclosed in the first of these cases were these. W. C. by his will and a codicil thereto, bearing date 14th of May, 1750, charged the residue of his real and personal estates with the payment of his debts, &c. The will and codicil were duly executed in the presence of, and subscribed by, three persons, who were his creditors at the time, two of them being his attorneys, and the other his apothecary; but they were all paid their debts before their examination. W. C.'s personal estate was sufficient to pay all the simple contract debts. The question was, whether these paper writings were duly executed, so as to pass lands. After the Court had taken time to consider of it, they all agreed that the will was duly attested by three credible witnesses. And Lord Mansfield delivered a very elaborate judgment, in which he took occasion to enter fully into the discussion of the meaning of credibility, in relation to the statute of frauds; which his Lordship considered capable of being conferred on an interested witness, by payment or a release, viz. indigent orphans under ten years of age, unable to labour, poor aged people utterly passed labour, poor impotent people lame or blind, and who could not labour, and to put out the children of such poor people as above, either sons or daughters, apprentices as soon as they were fit for it. This paper writing was duly signed, sealed, and published, by the said J. K., in the presence of three witnesses, two of whom were two of the trustees above-named.

[125]

tice Leo considered that the witnesses who were required to be credible, should not be such as claimed a benefit by the will; that if the tender should be equal to the payment of the two money legacies (as it was not), yet the annuity charged upon the estate devised would still subsist; and though it was charged both upon the real and personal estate, and the personal (which was not found to be sufficient) would be the first fund, yet it was for H.'s advantage to enlarge the fund, by taking in the real estate; and, at law, the husband must be considered as benefitting by the annuity, though given to the wife's separate use; for it was his money the moment it was paid into her hands, or if not, it eased him in point of maintenance. It had been objected, that nothing vested until the death of the deviser, and that, therefore, at the time of the attestation he had no interest; but the answer was, that he was then under the temptation to commit a fraud, and that was what the parliament intended to guard against. Another way that it had been attempted to be supported was, that it might be void as to the annuity, but good as to the devise; which was grounded upon an expression in Carthew's report of *Helliard v. Jennings*, ante, p. 123. that the will was void, *quoad* the devise of land to the plaintiff.— But that whoever read that will from the record, would see, that there were no other lands devised; and therefore it was equal to saying, it was void as to any passing of lands; and that it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will. That a contrary construction would open a door to fraud. Suppose a man had four estates, and was beset with four who fraudulently procured a will whereby each had a separate estate devised to him; if one was allowed to be a witness for the other three, they thereby would establish it for the whole. In 1 *Ld. Raym.* 730. it was held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 *Mod.* 263. the party benefitted in one sheet could not be set up to prove every other sheet. That it was agreed that this man could not be examined; how then was he that credible witness that the statute required. The true time of his credibility was the time of attestation, otherwise a subsequent infamy, which the testator knew nothing of, would avoid his will. That the *Digest*, lib. 28. tit. 1. s. 22. *De Testibus, Subscriptionem et Signis*, was express; *conditionem testium tunc inspicere debemus cum signarent non mortis tempora*, and so was the *Code*, lib. vi. tit. 23. l. 1. The Court therefore held, that this was not a good attestation. But this case was afterwards carried on appeal into the Exchequer Chamber, where there was a difference of opinion thereupon among the judges; but, the parties compounding, it was never determined.— See 1 *Ves. sen.* 503. 2 *id.* 374.

3. *OXENDEN v PENERICE.* 2 *Salk.* 691.

But a legatee may be witness against a will.*

The Court said that a legatee might be a witness against a will; for the reason why a legatee was not a witness for a will, being because he is presumed to be partial in swearing for his own interest; it follows that a legatee when he swears against a will, swears against his interest, and so is the strongest evidence.

med; and they, and also the other subscribing witness, were, at the time of attesting, seised in fee-simple of lands, &c.; within the lordship and township of M., and occupied the same; the lordship of M. maintained its own poor; and the witnesses to the will were charged towards the poor, and all other taxes of the said lordship. The witnesses, who were trustees, had, previously to the trial, released their interest to the other trustees; and they and the other witnesses had also disposed of their estates lying in the lordship. The question was, whether this will was sufficient to pass the hereditaments, which depended upon the question, whether the release and disposition of their respective interests had restored the credit of the witnesses; for, if not, it must fall to the ground, as the objection to it was cured by the act of the 25 G. 2. And it was held, by *Clive, Bathurst, and Gould.* against the opinion of *Pratt*, Chief Justice, that a witness, incompetent at the time of attestation, might purge himself afterwards either by release or payment, and become competent by the rule of law. But the cause was afterwards adjusted by agreement: see 2 *Ves.* 636; 11 *id.* 240.

* And if it stand indifferent to the witnesses whether the will, under which they are legatees, and to which they are witnesses, be valid or not, the witnesses, though legatees, are credible; 1 *Burr.* 427.

4. *HATFIELD v. THORP.* E T. 1822. K. B. 5 B. & C. 589.

An estate in fee on the determination of a life estate was devised to the wife of A. B. A. B. was one of the three witnesses who attested the will. Testator died in 1779, and the wife of A. B. in 1813, before the life estate was determined. A case was sent by the M. R. for the opinion of the K. B., and they certified their opinion to be, that the will was not duly executed so as to pass the real estate to A. B.'s wife.

5. *PENDOCK v. MACKINDER.* T. T. 1755. C. P. 4 Burn's Ecc. L. 95; S. C. Willes, 665; S. C. 2 Wils. 18.

In this case the question was, whether a person, who before the time of attestation had been convicted of stealing a sheep, and had judgment of whipping, was a sufficient witness within the statute; the Court of Common Pleas were clearly of opinion that he was not; and laid it down, that it was the crime that created the infamy, and not the punishment. The Court said, that the pillory had been always looked upon as infamous, and to take away a man's competency as a witness; but to show the absurdity of this notion, suppose a man was convicted on the statute against deer-stealing, there was a penalty of 30*l.* to be levied by distress; and if he had no distress, he was to be put in the pillory; so that, if the pillory were infamous, the person convicted would be infamous if he had not 30*l.* But if he had 30*l.* he would not be so. Petit larceny was felony, and there was no case where a person convicted thereof was ever admitted to be a witness. See 31 G. 3. c. 35; 2 Salk. 690; 1 Fortesc. 208; 2 Hale's P. C. 277; and Phillips, Starkie, and Roscoe, on Evidence.

where the attesting witness is the husband of the devisee, who takes an estate in fee in remainder, he is not competent witness to a will.

IV. RELATIVE TO THE CONSTRUCTION OF THE FORMAL PARTS OF A DEVISE, AND OF WHAT THEY IN GENERAL CONSIST.

(A) GENERAL RULES OF CONSTRUCTION.*

1st. *Intention of testator.*

(a) *In general.*

1. *DRIVER, D. FRANK, v. FRANK.* T. T. 1814. K. B. 3 M. & S. 25; S. C. affirmed in Exch. Ch.† 3 Moore, 519; S. C. 6 Price 46. *S. P. BADDELEY v. LEPPINGWELL.* T. T. 1764. K. B. 3 Burr. 1533. *S. P. ROWSE'S CASE.* M. T. 1772. K. B. Loft. 97. *S. P. FEN, D. LOWNDES, v. LOWNDES.* T. T. 1768. K. B. 4 Burr. 2246. *S. P. HOLMES v. MEYNEL.* M. T. 1678. K. B. T. Jones, 172. *S. P. REVE v. LONG.* Comb. 252. *S. P. MILFORD v. SMITH.* M. T. 1693. K. B. 1 Salk. 225; S. C. 4 Mod. 131; S. C. Comb. 195; S. C. 1 Show. 350. *S. P. BADGER v. LLOYD.* T. T. 1697. K. B. 1 Salk. 232; S. C. 1 Com. 62; S. C. 1 Lord Raym. 523.

A testatrix devised to A. (the husband of testatrix's niece) for life, and after his decease, to his second, third, and fourth and all and every other the

In construing a will, the intention of the

* The construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject: 3 P. Wms. 259; 2 Ves. sen. 74; 1 Ves. jun. 16; 2 id. 417; 4 id. 329.

It has been a subject of regret with eminent judges (see Lord Kenyon's judgment in *Dean, d. Moor, v. Mellor*, 5 T. R. 561; *Doe v. Allen*, 8 T. R. 502; see also *Wilm.* 398.) that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules has introduced so much uncertainty and litigation. But, though the intention of testators is implicitly obeyed, when ascertained, however informal the language in which it may have been conveyed; yet the Courts, in construing that language, resort to certain established rules by which particular words and expressions standing unexplained, have obtained a definite meaning, and such meaning, it must be confessed, does not always quadrate with their popular acceptance. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation; see *Doe, d. Lyde, v. Lyde*, 1 T. R. 596; *Langham v. Sanford*, 2 Mer. 22; *Jones v. Morgan*, 1 B. C. C. 221; *Seale v. Bator*, 2 Bos. & Pull. 94; and, consequently, to use expressions in their legal sense, i. e. in the sense which has been affixed by adjudication to the same expressions, occurring under analogous circumstances; a presumption which, though it may sometimes

† Wood, Baron, contra.

[127] parties is the primary object to be attended to, which must be guided by such words, as in legal construction can carry such intention into effect.

son and sons of the body of A. begotten or to be begotten on the body of C. his then wife (except the first or eldest son), successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and of the heirs male of the body of every such son and sons (except the said first or eldest son), remainder to B. (the youngest son of another nieco of the testatrix) for life, remainder to his issue in tail. A. had four sons, the three eldest of whom died in his life-time without issue, and the youngest alone survived him; but the second and third, and afterwards the second and fourth, were existing at the same time. At the time of making the will, A. was in possession as tenant in tail of a large estate. Lord Ellenborough was of opinion that such only surviving son was not entitled, inasmuch as he did not answer the description of second son, at the decease of A. the father; during whose life he considered the estate to be contingent; or that, if it vested in the person who first became second son in the life-time of the father, yet that it was divested as such son became the eldest. His lordship grounded his construction on the testatrix's evident intention, by the exclusion of the eldest son, to prevent the union of the estates of that family and her own. The other three judges (Le Blanc, Bayley, and Dampier), however, were of a different opinion, considering such an intention, in the absence of an expression of it, as merely conjectural, though probable, and they held the surviving son to be entitled.

[128] 2. *BETTISON v. RICKARDS*. T. T. 1816. C. P. 7 Taunt. 105; S. C. 2 Marsh. 413; *S. P. DOE, D. BEACH, v. THE EARL OF JERSEY*, 1 B. & A. 550; S. C. 3 B. & C. 370.

And in doing this they will attend to the circumstances under which the deviser makes his will; such as the state of his property.*

A testator, after devising an estate *pur autre vie*, devised all his other estates real and personal, wheresoever situate, unto E. L. his heirs, executors, &c. for ever, charged with debts and certain legacies; and in case his son should die without issue of his body lawfully begotten, then he devised all his manors, messuages, tenements, and real estate, not therein before disposed of, situate in the several counties of H. G. N. I. and D. and the town of N. (though, it will be observed, he had previously disposed of all his real and personal estate) and also all his personal property in the public funds or elsewhere, unto the said E. L. during her life, and after her decease unto R. S. in fee. It appeared that the deviser had the reversion in fee expectant on the determination of an estate tail male in his son, in large estates in the several counties specified, except D. and the town of N. where he had lands in fee simple in possession. It was contended that the latter devise was confined to the lands in the specified counties, of which the deviser had the reversion only; and that the other lands, even in the counties particularized, passed under the first devise; and of this opinion appears to have been the Court, as the judges certified that E. L. took an estate in fee in the lands in D. and the town of N. subject to the debts, &c. See 2 Powell by Jarman, p. 664.

have disappointed the intention of testators, is fraught with the greatest general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had been stamped with the sanction of a judicial decision. And, indeed, dispositions conceived in the most appropriate forms of expression must have been rendered precarious by such a licence of construction, as set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. The language, therefore, of the Courts, where they speak of the intention as the governing principle, sometimes calling it "the law" of the instrument (per Hale, in *King v. Melling*, 1 Vent. 231.); sometimes the "pole star" (per Wilmot, C. J., in *Doe, d. Long, v. Laming*, 2 Burr. 1112.), sometimes the "sovereign guide" (per Wilmot, C. J., in *Doe, d. Dodson, v. Grew*, 2 Wils. 322.), must always be understood with this important limitation, that here, as in other instances, the judges submit to be bound by precedents and authorities in point, and endeavour to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary conjecture; 2 Powell on Dev. by Jarman, vol. ii. p. 2.

It may be here remarked, that a will of real estate, whether it is made, or in whatever language it be written, must be construed according to the laws of the country where the property, upon which it is intended to operate, is situated; Prec. Ch. 577.

* Of his family; 3 Bro. P. C. 257; 4 id. 441; 4 Burr. 2165; 3 Dow. 72; 3 B. & A. 657; id. 632; S. C. 2 Moore, 302; et post, where the question of what amounts to a revocation is considered, or the like: 1 Bl. Rep. 60; 1 Meriv. 4. 38.

(b) *As to where two opposite intentions are expressed in a will.*

1. DAINTRY v. DAINTRY. T. T. 1795. K. B. 6 T. R. 307.

The testator, after giving different annuities to an only son, increasing with his age till 30, and to be paid to him until he should marry, continued: "and in case my said son shall happen to marry before he shall attain the age of 30 years, then I give and devise to him and the heirs of his body all my real and personal estates, &c.; and if my said son shall happen to die without leaving issue of his body, then I give and devise all my real unto J. D., and my personal unto M. D. for ever." The son attained 30, without marrying. The question was as to what estate he took? For the plaintiff it was contended that, in the event of his having continued unmarried until he was 30, he was entitled to both the real and personal estates of his father. For the defendant it was insisted, 1st, that the son not having complied with the condition imposed upon him by his father's will, of marrying under the age of 30, was not entitled to any part of the real estate, but must rest satisfied with the annuity there given to him; and 2nd, that, whatever interest he may be entitled to in the real estate, the devise over to the uncle J. D., is a good executory devise, as to certain leases for years, which composed part of the personalty. [129]

Per Cur. We are of opinion that the son took an estate tail in the real property, and the personal estate absolutely; for although there is no express devise to the son in the event of his marrying after 30; yet the words introductory of the devise over are sufficient to raise an estate tail by implication; and though subsequent to the words expressly giving an estate to the son's issue, in wills the last words take effect.

2. DOE, D. BLANDFORD, V. APPLIN. M. T. 1790. K. B. 4 T. R. 82.

Devise to A. for life, and after his decease and amongst his issue; and, in default of issue, to be divided between his nephew B. and his niece C., and to their heirs and assigns for ever. A. married D. and had one child, who survived her father, but soon afterwards died. The question was, what estate A. took? The Court, notwithstanding the words *and amongst*, which appeared to imply division, were of opinion that A. took an estate tail; since, otherwise, the testator's general intention could not be fulfilled, the devise over being in default of issue of A., which issue could not take, unless in a course of descent. And that, by this construction, they would certainly go further than they had done in any of the former cases; because, in order to satisfy it, they must reject words *and amongst*; but in doing this they thought they were warranted from the general intent of the deviser, who meant A.'s whole line of issue to take in preference to the remainder-men.

(c) *As to where a particular and general intention are both expressed.*

1. CAMPBELL v. VAUGHAN. T. T. 1773. K. B. Lofft. 266.

This was a devise to a brother during life, and, after his decease, to his first and other sons; and, for want of such issue, to nephew and niece, share and share alike, during life; remainder to their issues male, and remainder to the heirs of the nephew for ever. The brother died without issue; the defendant claimed under him, and the plaintiff under the nephew. But the Court, laying it down as the best rule, first, to find out the general intent, and then, as well as grammar and language will permit, to interpret particular expressions accordingly, held, that the brother took only an estate for life.

2. CUTHBERT v. LEMPRIERE. T. 1814. K. B. 3 M. & S. 158.

A testator being tenant of copyhold premises at C., under four several admissions, to the use of himself for life, and of such person as he should appoint; and in default of appointment to the use of himself in fee, subject to certain quit-rents; and being seised and possessed of other real estates in Great Britain and Ireland, and of a leasehold estate held under two leases at B., devised his whole real estate in lands, in Great Britain and Ireland, to his wife for life, and after her death to be divided between his two nephews and their respective issue; and, in default of such issue, to be divided between the children of his nieces, &c.; and by codicil, reciting that he had ordered all his estate in Great Britain and Ireland, after the decease of his nephews with issue, to be

Where two opposite intentions are expressed in a will, the last in order shall be preferred.

Unless in the case of a general and particular intention, when the general intention shall prevail.

To which particular expressions will be adapted, as far as grammar and language will permit.

So as, that the latter shall qualify and restrain the former.

[130] divided, &c., he revoked the same, and before that division devised his *whole real estate* to B. and his heirs male, &c., and devised his *two leases, with the quit rents of his lands in C. and in B.*, to E., after his wife's decease. The Court certified to the Court of Chancery that E., after the wife's death, took a fee in the copyhold premises. See 1 P. Wms. 286; 11 East, 246, 290.

3. DENNE, D. RADCLYFFE, V. BAGSHAW. H. T. 1796. K. B. 6 T. R. 512.

But where a particular intention is expressed in a will in clear and precise terms, it must be fulfilled in opposition to a general intention that is only to be implied, though supported by conjecture, in the high est degree probable, that the devise did not know the force of the expression he was using.*

The testator, after devising estates to his nephew, gave to his daughter M. B. all his estate, lands, tenements, and premises, called, &c., for and during the term of her natural life, and from and immediately after her decease, to the first son of her body, if living at the time of her death, and the heirs male of such first son; and for default of such issue to the second son of her body, if living at the time of her death, and so to third, fourth, &c.; and for default of such male issue to his nephew. M. B. married, and had issue one son, who died in the life-time of the said M. B. M. B. soon afterwards died. The question thereupon was, what estate M. B. or her son took? It was contended, that the testator must have intended that the nephew, who was otherwise provided for, should not take until failure of all the descendants of his daughter; and that, to accomplish this intention, the Court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth, and that the words *if living at the time of her death*, merely marked the period when the remainder should commence in possession. But the Court said: the cases cited proceed not on the formal or technical words, but on informal words in the wills, where the Court were left to collect the intention of the testator, as well as they could from the different parts of the wills; whereas here correct and technical expressions were used throughout, and no lawyer could have introduced more formal words on the limitations in the will than the deviser had used. They accordingly held, that M. B. took only an estate for life; and that neither his son or grandson took any estate, but that the remainder took effect.

2ly. *In relation to the heir at law.*

1. DOE, D. VESSEY, V. WILKINSON. H. T. 1788. K. B. 2 T. R. 209. S. P. DOE, D. HICK, V. DRING. E. T. 1814. K. B. 2 M. & S. 418. S. P. ANON. E. T. 1704. K. B. 6 Mcd. 133 S. P. SHAW V. BULL. M. T. 1701. K. B. 12 Mod. 592. S. P. LEIFE V. SALTINGSTONE. 1 Mcd. 189.

It is, next, a rule of construction [131] to which the intention of a testator must always be subservient that, in order to disinherit the heir at law, the devise must evince a plain intention and not a probable one.

A verdict taken, subject to the opinion of the Court, disclosed that an estate had been settled by deed to the use of M. W. for life; remainder to trustees for 500 years, upon the trusts after mentioned; remainder to J. W. and his issue, in the usual course of strict settlement; remainder to M. W. by her will, after reciting the settlement, declared the trusts of the term of 100 years to be that, if the said J. W. or any issue of his body should be living at the time of her decease, then the trustees should, immediately after her decease, raise 1000*l.* for the purposes therein mentioned; and in case neither the said J. W. nor any issue of his body should happen to be living at the time of her decease, by which event the said estate, by virtue of and under the limitations in the said deed of settlement, would devolve upon her and her heirs, then she gave the premises to the same trustees for the term of five hundred years, in trust to raise the said sum of 1000*l.* immediately after her decease, and to raise the further sum of 1000*l.* within six months next after her decease, for the purpose therein mentioned; and from and after the determination of the said term, and subject thereto, she devised the premises to her mother for life; remainder to her own daughter in fee; but, in case her daughter should die under 21, and without issue; then to the defendant in fee. The testatrix died in the lifetime of J. W., who afterwards died without issue; the mother afterwards died, and then the daughter, under 21, and unmarried. The lessor of the plaintiff was heir at law to the testatrix, and also heir at law *ex parte materna*; to her daughter. The question was, whether he or the defendant were entitled? There was a difference of opinion on the Bench.

* And, where a testator's intention cannot operate to its full extent, it must operate as far as it can; Finch. 130; 3 P. Wms. 250; 4 Ves. 325; 13 id. 426.

Grose and Ashurst, (Mansfield, C. J. absent) Justices, said, that the contingency, of J. W., or any of his issue not being alive at the death of the testatrix, was annexed to all the subsequent limitations, such being the express words of the devise, and the intention to be collected from them was confirmed by what followed. The second trust upon the contingency in question was to raise a further sum of 100*l.* and that not at any future time, whenever the remainder might happen to vest in possession, *but within six months after her decease*, a direction incompatible with a devise of the remainder at any indefinite period. The estate for life, too, which was given to the mother, then an old woman, was subject to the same observation. Were we, said they, at liberty to look to probable intentions, the features of the case might be altered: but courts of law have always so far favoured the title of the heir at law, as to lay it down as a rule, that he shall not be disinherited but by plain intention, and not by probable intention. But Buller, J. differed from the rest of the Court, and thought the contingency annexed to the term should not be extended to the fee. He admitted that the legacies under the term created by the will were not to be raised, unless the remainder vested in the life-time of the testatrix; but the intention of the creation of the term was for the purpose of having one term, and one term only, exist in any event. She gave this estate for the same number of years to the same trustees, and to raise the same sum of 100*l.* with an additional 100*l.* as that created by the settlement. By the words "from and after the determination of the said term, and subject thereto" she meant only subject to that term which should be in being at her death. If this construction should be right, this was a plain devise of a remainder subject to a term of 500 years. With respect to the words annexed to the contingency, viz. "by which event the estate would devolve upon her," &c., they meant only would fall into possession. [132]

2. *RIGHT, D. MITCHELL, v. SIDEBOTHAM.* T. T. 1781. K. B. 2 Doug. 759.

A. B. devised as follows:—"for those worldly good and estates wherewith The proper
it hath pleased God to bless me:—I give and dispose of the same in manner ty must be
following." He then gave one shilling to his heir at law; and, after giving completely
other legacies, came to this clause: "and I do give and devise unto S., my devised to
said wife, her heirs, and assigns, for ever, all my lands lying in the parish of A. another.*
and I give and bequeath to my loving wife aforesaid, all my lands, tenements,
and houses, lying in the parish of C. N." The question was, whether the
last-mentioned premises were devised to the widow in fee, or for life.

* It may not be here unacceptable to the reader, to notice those cases, in which beneficial interests have been holden to enure to the heir at law, where the objects contemplated by the testator have either partially or totally failed, and which are ably collected and commented upon at length by Mr. Jarman (2 Powell, p. 32 to 52), of which the author has availed himself, and to which he refers the peruser of this work for further information, should he be desirous of more minutely considering the subject. No rule of law is better established than that where the lands are devised in trust for objects incapable of taking, or not sufficiently defined, or who die in the life-time of the devisor, the beneficial interest in the lands so devised results to the heir at law; *Hartop's case*, 1 Leon. 253; *S. C. Cro. Eliz.* 243. And, upon the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or to pay the rents to A. for life, and no further trust is declared, all the annexed beneficial interest results to the heir as real estate undisposed of; *Culpepper v. Aston*, 2 Cha. C. 115; *S. C. ibid.* 223; *Roper v. Radcliffe*, 9 Mod. 171; *S. C. 2 Eq. Ca. Abr.* 703. This principle is so well settled, that if the character of trustees be plainly and unequivocally affixed to the devisees, no question can, at this day, be raised on the application of it; but the difficulty in these cases, generally, is to determine whether it be intended that the interest in the land, ultra the purpose to which it is devoted, belong to the devisees in a fiduciary character, or for their own benefit. This distinction between the two classes of cases was lately stated, by Lord Eldon, in these terms: "If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is on trust to pay my debts, that is, a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose: the latter is a devise for a particular purpose, with no intention to give him any beneficial interest; where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest, as is not exhausted, belongs to the heir: but, where the whole legal interest is given for a particular pur-

[133] Per Lord Mansfield. I verily believe that, almost in every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and

pose, with the intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him." The circumstance that the heir at law is a legatee does not prevent the trust resulting to him; 1 P. Wms. 390; 1 Ch. Ca. 196. Indeed, where the property is devised in trust to be sold, the point is at this day so clear against the trustees, that a claim by them is seldom made; but the question in such cases generally arises between the heir at law, the residuary legatee, or next of kin; Amb. 165; 3 Dow, 248; 2 Vern. 183. But, wherever the intention to give the devisee the beneficial interest, as well as the legal estate in the land, is apparent, no trust results to the heir. This is so much a truism, that no question can ever arise on the principle itself, though the application of it is sometimes difficult, from the obscurity of the intention; 1 Atk. 618; 3 Ves. 210. An exception to the rule, that the ulterior beneficial interest in lands devised for a particular purpose results to the heir, arises where the devise contains expressions importing an intention to confer on the devisee a benefit; 3 P. Wms. 193; 2 Vern. 425; 1 Ves. & Bea. 276; 16 East, 283; 2 Ves. sen. 27. It may be useful to state, that an important exception to the doctrine of resulting trusts exists in regard to gifts to charity: though, as devises to such uses are prohibited by the statute of mortmain, except in favour of certain objects, the question is not in general applicable to this species of disposition. It is this: that where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir at law; *Thetford School case*, 8 Co. 130; *Duke's Ch. Uses*, 71; *Sutton Colefield's case*, 10 Rep. 31, Duke, 28; *Att. Gen. v. Johnson*, Amb. 190; *Att. Gen. v. Sparks*, Amb. 231; *Att. Gen. v. Haberdashers's Company*, 4 B. C. C. 103; *Att. Gen. Tonner*, 2 Ves. jun. 1; *Bishop of Hereford v. Adams*, 7 Ves. 324. Next as to the destination of specific sums charged on real estate void ab initio, or subsequently failing by lapse. On this subject this at least is indisputable, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee; *Att. Gen. v. Milner*, 3 Atk. 112; *Croft v. Snee*, 4 Ves. 60; 3 Dow. 212: care must be taken, however, to distinguish between contingent charges, which fail on account of the failure of the event which is to give them birth, and those which lapse by the death of the legatee in the testator's lifetime; in the latter case, it does not follow that, because the legacy is contingent, it sinks for the benefit of the devisee. The true distinction seems to be this: that if the event which has happened in the testator's life-time would have entitled a person, to whom the sum charged, was expressly given in the alternate event, it belongs to the devisee of the land so charged; being a consequence of the principle that a residuary devise, after a specific contingent devise, is to be read, quoad that property, as a specific gift in the alternate event; 2 Powell, by Jarman, p. 48. With respect to the general question, whether charges, void or failing, belong to the heir or the devisee, Lord Eldon has stated, 19 Ves. 363, the result of the decisions to be, that if the estate is given to the devisees in such a way, that a charge is to be created by the act of another person raising the question between that person and the devisees, the heir has no claim; but, if the deviser has himself created the charge, and, to the extent of that charge, the intention appears on the face of the will not to give the estate to the devisees, it will, to the extent of that charge, the particular object failing go to the heir; a distinction which his Lordship characterized "as extremely nice, perhaps not easy of application." But even the adoption of this distinction, with its acknowledged nicety, will be found not to reconcile all the cases, in which a deviser has himself created a specific definitive charge, on a devised estate in favour of another person; 1 Ves. sen. 108; Amb. 643; 1 Bro. C. C. 61; Amb. 487; 2 Atk. 36; 3 Dow. 212; 4 Ves. 811, 812, id. 497. Upon these cases last quoted, Mr. Jarman, Powell on Dev. vol. ii. p. 49, says: considering that the three first cases, meaning 1 Ves. sen. 108; Amb. 643; 1 Bro. C. C. 161; were all decided upon the general principle, and the two first, particularly, upon great consideration; and that of that of the latter class, Amb. 487, may have been decided upon its particular circumstances; 1 Bro. C. C. 162, has been referred to by Lord Eldon as a contrary decision; and 12 Ves. 497, was decided in the absence of the heir, and may therefore be regarded as *res non adjudicata* as to him; it is submitted, that the better conclusion is, that the authority of the first line of cases preponderates, and consequently the right of the heir is substantiated. This conclusion is forfeited by the apparent recognition of the authority of those cases by Lord Eldon; 19 Ves. 363. On another occasion (*in Tregonnell v. Sydenham*, 3 Dow. 212) his Lordship seemed to treat the cases in which the devisee had been held to be entitled, as exceptions to the general rule; for, in reference to these cases of devises to charitable purposes, he observed; "That where gifts, rendered void by the statute, did not go to the heir, they all seem to have been decided upon one or other of these grounds; that the heir at law was completely disinherited, and that his claim was barred under the intention of the testator." The conclusion, too, seems to be powerfully confirmed by the cases *Page v. Leapingwell*, 18 Ves. 463; *Gibbs v. Rumsey*, 2 Ves. & Bea. 294; *Jones v. Mitchell*, 1 Sim. & Sta. 290; *Cruse v. Barley*, 2 P. W. 20; *Collins v. Wakeman*, 2 Ves. jun. 685; establishing that the

personal property; the rule of law, however, is established and certain, that [134] express words of limitation, or words tantamount, are necessary, to pass an estate of inheritance. All my estate, or all my interest, would do; but, all my lands laying in such a place, is not sufficient; such words are considered devise of a sum of money, out of the produce of land directed to be sold, being void, *ab initio*, such interest belongs to the heir, and not to the residuary devisee of the fund. Upon principles analogous to those which governed the cases of the preceding classes, it has been decided that if, in a series of consecutive limitations, a particular estate be void in its creation, from being limited to a person incapable by law to take; the remainders immediately expectant on such estate are not accelerated by that event, but the interest in question descends to the heir at law, as real estate undisposed of; 2 P. Wms. 361; and the same principle applies where the limitation has become void from events subsequent to its creation; 2 Vern. 158; 1 Ch. Ca. 113; 3 Dow. 194. The principle of these cases seems to apply to the case of a particular estate refused by the devisee, though the contrary is laid down in the early authorities; Dyer, 301; Cro. Eliz. 423; 1 Eq. Ca. Ab. 216. pl. 4; Plow. 414; 1 Rep. 101. a. But cases such as these just referred to are carefully to be distinguished from the ordinary case of a term created for particular purposes, and the land subject thereto devised over; in which case the term, after the purposes of its creation are satisfied, or immediately, if those purposes never arise, attends the inheritance for the benefit of the devisee; and in one case this was the result of the decision, though the nature of the trust and the expressions of the testator afforded an argument in favour of a contrary intention; (*Davidson v. Foley*, 2 B. C. C. 203; see Lord Eldon's judgment in *Sidney v. Shelley*, 19 Ves. 364.) The same principle has been applied to a case in which a term was devised upon trusts, to be therein after declared, with devise over on "the expiration or sooner determination" of it, but no trusts were actually declared; 19 Ves. 352; 1 Atk. 191.

On the principle that equity considers that as done which ought to have been done, it has been long established that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and thus, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed; 1 Bro. Ch. Ca. 499; 5 Ves. 396; 2 Powell, by Jarman, p. 60; Leigh and Dalzell's Fquitable Conversion of Real Property.

It is clear, that where a testator directs a real estate to be converted into money for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest; such unexhausted interest, whether the estate be actually sold or not, (see *Hill v. Cock*, 1 Ves. & Bea. 173.) belongs to the heir, as real estate undisposed of; *City of London v. Garway*, 2 Vern. 571; *Countess of Bristol v. Hungerford*, ib. 645; *Cruse v. Bailey*, 3 P. W. 20; *Digby v. Legard*, 2 Dick. 500, cited 1 B. C. C. 501; *Robinson v. Taylor*, 2 id. 5-9; *Spank v. Lewis*, 3 id. 355, *Chitty v. Parker*, 4 id. 411; 2 Ves. jun. 271; *Collins v. Wakeman*, 2 id. 683; *Halliday v. Hudson*, 3 id. 210; *Howse v. Chapman*, 4 id. 452; *Kennell v. Abbott*, id. 803; *Williams v. Cogdo*, 10 id. 500; *Berry v. Usher*, 11 id. 87; *Wilson v. Major*, id. 205; *Gibbs v. Ougler*, 12 id. 413; *Wright v. Wright*, 16 id. 188; *Hooper v. Goodwin*, 18 id. 156; *Hill v. Cock*, 1 Ves. & B. 173; *Markham v. Mason*, id. 410; *Gibbs v. Ramsay*, 2 id. 294.

The position, says Mr. Jarman (2 Powell, p. 79.), that the heir is not excluded by any conversion, however absolute, from taking any unexhausted interest, may seem indeed to be indirectly encountered by those cases in which a distinction has been anxiously taken between absolute and qualified conversion; (*Wright v. Wright*, 16 Ves. 188.) a doctrine which seems to be maintained by the learned editor of Peere William's Reports, who, in a note which is often referred to, (*Cruse v. Bailey*, 3 P. W. 20. Mr. Cox's n.) states the question in these cases to be, "whether the testator meant to give to the produce of the real estate, the quality of personality, to all intents, or only so far as respected the particular purposes of his will." With deference, however, to this respectable opinion, he submits, that such a distinction cannot be sustained; for not only do the cases not contain a single instance of a conversion of the former species, but it has even been held that, where the testator declared that the surplus produce of the sale, after paying debts, should be deemed personal estate, (*Collins v. Wakeman*, 2 Ves. jun. 683.) and go to his executors; yet that surplus did not belong to the next kin, for whom the executors, having equal legacies, were trustees, but to the heir; *Countess of Bristol v. Hungerford*, 2 Vern. 645; 8 C. 1 Eq. Ca. Ab. 27. 2. pl. 6.

In further confirmation of the principle in question, it is now settled that the undisposed residue of a fund created in this manner will not pass under a general bequest of personality; *Falbot*, 78; 1 Ves. & Bea. 415; 12 Ves. 205; 3 Dow. 248; 2 Ves. jun. 683. It seems, however, that where some of the purposes of the conversion fail, and the property quoad that interest, consequently results to the heir, yet it results to him as personal estate, and

- [135] merely as descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt of the testator's intention here to disinherit his heir at law, as well as in *Denn v. Gaskin*, Cowp. 657; but the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, is that the testator had any meaning by it (which I do not believe he had), rather turns the other way, because he uses different words in devising different parts of his estate. I think we are bound, by the case of *Denn v. Gaskin*.—We must therefore decide that the widow took only a life estate in the last-mentioned premises.

3ly. *With reference to modes of expression.*

[136]

1. *That words are to be taken in their ordinary sense.*

1. POOLE v. POOLE H. T. 1804. C. P. 3 B. & P. 620.

Words are always to be taken in their ordinary sense, unless the testator has demonstrated an intention to use them in another.

From the facts sent to this Court by the Lord Chancellor, it appeared, that there was a devise to testator's first son by his wife begotten, or to be begotten, for life; remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing; so as the elder of such sons, and the heirs male of his body shall always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all and every other son and sons, for their several and respective lives; remainder to trustees, to preserve, &c.; remainder to the several heirs male of their several and respective bodies, lawfully issuing, so as to the elder of such sons, and the heirs male of his body shall be always preferred, and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters, for their lives; remainder to trustees, &c.; remainder to their several heirs male of their several and respective bodies lawfully issuing; so as the elder of such daughters and the heirs male of her body shall always be preferred and take before the younger of the same daughters and the heirs male of her and their body and bodies. There were other clauses in the will by which, after giving an estate for life to the first taker, the testator limited to trustees, &c. remainder to the first and other sons of such first taker and the heirs of their bodies; so as the elder of such sons and the heirs of their bodies should always be preferred before the younger of the same at his death devolves as such to his representatives; 1 Bro. C. C. 86; 16 Ves. 188; 4 Mod. 484.

The heir sometimes claims (see 2 Powell, by Jarman, p. 86.) specific sums, constituting part of the produce of real estate devised to be sold, which are either expected out of the devised produce, but are themselves not disposed of; or, being disposed of, are given to objects incapable by law of taking them; or the disposition fails in event, by the death of the devisee in the testator's life-time. As to the first class, it is clear, upon the authorities, that a sum expected out of the produce of the sale, but not disposed of, belongs to the heir (*Collins v. Wakeman*, 2 Ves. jun. 683; see *Emblyn v. Freeman*, Pro. Ch. 541.) With regard to the second class, namely, cases in which a sum so to be raised is given to an object incapable by law of taking, it is also clear that it devolves upon the heir; 18 Ves. 463; 1 S. & Str. 293. The principle of the two preceding classes of cases seems to apply, with exactly the same force, to the cases of lapse, which is the other species of case; and, undoubtedly, up to a late period, the established rule as to these cases also was, that the heir was entitled on failure of the devise; unless, according to the doctrine of some cases, (*B. Bro. Ch. Ca.* 168; 4 Ves. 50.) the produce of the sale was blended with the personal estate in one general residuary disposition.

As to the destination of pecuniary charges, where the residue of the real estate devised to be sold has been blended with the personalty; Mr. Jarman (2 Powell, 95.) says: I have not been able to discover more than one dictum and one decision in favour of the distinction in question, though they include the respectable names of Lord Thurlow and Lord Alvanley. The former is contained in the case of *Hatcheson v. Hammond* (3 B. C. C. 148.) where Lord Thurlow observed, "though if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of;" the latter is contained in 4 Ves. 802. But not only (observes Mr. Jarman, p. 97.) is Lord Alvanley's doctrine unsupported by the cases on which he founded it, but the doctrine and decision are directly at variance with several cases, both anterior and subsequent to his Lordship's case; 3 P. Wms. 20. 2 Ves. jun. 683; 2 Ves. & Bea. 294.

sons and the heirs male of their bodies. The Court held, that the first son of the testator took an estate tail. See *Ambl.* 344. 358; 1 *Bro. C. C.* 206; 1 *Burr.* 38; 2 *Wils.* 322; 7 *T. R.* 531; 1 *East*, 229. 264; 2 *Ld. Raym.* 1561; 2 *Stra.* 1125; 2 *Atk.* 216.

2. *DOE, D. COMBERBACH, v. PERRY.* M. T. 1789. K. B. 3 T. R. 484. S.

P. DENN, D. BRIDDEN, v. PAGE. M. T. 1775. K. B. 3 T. R. 87.

The testator devised to D. for life, all his leasehold and personal estate; remainder to trustees, to preserve contingent remainders; remainder to all and every the children of D., begotten or to be begotten, on her body by J. C., and their heirs for ever, to be equally divided between and among such children, share and share, alike; but, if only one child, then to such child, and his or her heirs for ever; and, for default of such issue, to J. C. for life, with remainder to trustees to preserve contingent remainders. And from after the decease of the survivor, J. C. and D. without issue, then to the children of R. C. and B. P. respectively begotten, or to be begotten. D. and J. C. married in the life-time of the deviser, but had not any children until after his death; in 1739, 1740, 1741, the children died; in 1784, J. C. died; and in 1786 D. also died. The questions were, 1st, whether the children of D. took in fee; 2d, whether the limitation over to the children of R. C. and B. P. took effect on failure of the issue of J. C. and D. *Per Cur.* The operation of this will is, that the limitation to D's children was contingent till they were born, but it became vested on the birth of the first child, subject, however, to be diminished in quantity, as other children of D. should be born. And, on the birth of D's first child, the subsequent limitations were defeated. In the case of *Keene, d. Pinnock, v. Dickson.* M. T. 1783. K. B. which has been cited, which is similar to the present, there the devise was to G. P. for life, remainder to her first and other sons in tail general, and for default of such issue male, remainder over; and it was contended that the word "male" might be rejected; but the Court said they would not do it; but held that the remainder over was contingent only, on the event of there being a son; and if there were a son ever born, though he died, the remainder over was void. Then, the only question is, whether there is any thing in the will to show that the children of D. must necessarily be confined to children living at the time of the decease of their parents? but no words are used in the will, from which such an inference must necessarily be drawn.

2. *That all the words are to be taken together.*

ROE, D. NIGHTINGALE, v. QUARTERLY. H. T. 1787. K. B. 1 T. R. 630.

A testator devised in remainder, expectant on certain previous estates, which afterwards determined, to the right heirs of W. and M. his wife, for ever, without any antecedent estate to either of them. The wife died, leaving a daughter by W., who married again, and left a daughter by his second wife. Upon a dispute between the heirs of the first daughter, who died after surviving both W. and M., and the second daughter, it was argued, that the description of the right heirs of W. and his wife must either mean the heirs of the survivor, or give the estate in moieties between the heirs of each.

Sed per Cur. We are of opinion, that the devise operated in the same manner as if it had been to the right heirs of the body of W. and M. It is to be collected from *Co. Lit.* 107. that a grant to the husband and wife is not considered in the same light as a grant to other persons; for that, if a joint estate be made to husband and wife and a third person, the husband and wife have but one moiety, and the third person will have as much as them both; because the husband and wife are but one person in law. If then they were but one person by reason of the relation they stood in, a limitation to their heirs, without any prior limitation to themselves, must naturally mean heirs to them both, according to that relation which could only be children of them. Besides, such construction should always be put on a will, if possible, as will satisfy the words; and the words here are satisfied, if they be taken to mean the children of both of them.

[138]

3. *As to where expressions admit of two interpretations.*

ROWE'S CASE. M. T. 1773. K. B. Lofft. 97. S. P. DOE, D. VESSEY, v. WILKINSON. H. T. 1788. K. B. 2 T. R. 209. S. P. CHAPMAN v. BROWN. H. T. 1765. K. B. 3 Burr. 1626. S. C. affirmed, Dom. Proc. 3 Bro. P. C. 269.

To which end, expressions must receive that interpretation which will make them consistent with other parts of the will.

Per Cur. The idea, that Courts are to find out the intention from the general view of the will, is right; and, considering the great abuse of language every where, the ignorance of particular testators, and even of those who make wills for them, that meaning cannot be at all times found out by the accuracy of expression. But effect must in all cases be given to every word in a will, if it can possibly be accomplished; and, in order to accomplish this purpose, expressions admitting of two interpretations are always so construed as that they shall receive that interpretation which will make them consistent with other parts of the will.

4. *That words are to be taken in their grammatical sense.*

BURNSALL v. DAVY. H. T. 1798. C. P. 1 B. & P. 215; S. C. 6 T. R. 30.

Devise of freehold and leasehold estates to A. and the issue of her body as tenants in common; but, in default of such issue, or, being such, if they should all die under age and without leaving issue, then over, the leasehold vests in the remainder-man on the death of A. without issue.

This was a case sent from the Court of Chancery, and was this: A. devised all his freehold and leasehold estates to B. and the issue of her body, "as tenants in common; but in default of such issue, or, being such, if they should all die under 21 and without leaving issue," then over. The Court certified that all the limitations subsequent to that of B. being contingent, the remainders in the freehold were barred by fine and recovery; but that the leasehold vested in the remainder-man, on the death of B. without issue. In arguing on the propriety of the conclusion they had arrived at, the Court said: In order to discover the deviser's intention, consider what was his situation when he made his will; he had a niece, who would probably become the mother of children, and he gave an estate for life to that niece, and then an estate to the children which that niece might have. If the will had stopped there, the children would have taken a fee: but the deviser then gave the estate over; "but in default of such issue, or if they should all die under the age of 21, and without leaving issue, &c." There is no doubt, indeed, but that a word of conjunction in a will has been construed in the disjunctive; and, *vice versa*, a disjunctive word is construed in the conjunctive, where it has been necessary to give effect to the deviser's intention; but, unless there be something in the will, from which it is to be collected that he deviser did not use such words in the grammatical sense, the grammatical construction must prevail. In the present case, the word used is a conjunctive word "and;" now, by construing that word in its proper sense, we shall give effect to his intention. The deviser seems to have reasoned thus: If the children of my niece live to attain the age of 21, when they will be qualified to dispose of this property prudently, I give it to them in fee; if they happen to die under 21, and without leaving issue, then I will consider to whom I can best dispose of the estate, and in such event I will give it to my collateral relations. That brings the present case within that of *Loddington v. Kime*, (Salk. 224.) which is the leading case upon this subject, and converts all the subsequent limitations into contingent remainders. Those depended on the particular estate given to the niece, and she having destroyed this particular estate before they could take effect, they consequently fall to the ground.

[139]

5. *As to technical expressions.*(a) *In general.*

DOE, D. COOPER, v. COLLIS. T. T. 1791. K. B. 4 T. R. 294. S. P. DENN, D. WEBB, v. PUCKEY. T. T. 1793. K. B. 5 T. R. 299. S. P. AUMBLE v. JONES. H. T. 1709. C. P. Salk. 238.

Words in devises are not necessarily to re

The testator devised to his wife for life; remainder to his daughters A. and B., to be equally divided between them, not as joint tenants, but as tenants in common; viz. the one moiety to his daughter A. and her heirs for ever, and the other moiety to his daughter B. (a feme covert) during her life, and after her

* Thereby giving effect, if the case require, to devises apparently inconsistent; 4 M. & G. 1.

decease to the issue of her body, lawfully begotten, and their heirs for ever. The question was, whether B., who had one child living at the time of the devise, took estate in tail, or for life, by this devise. In favour of the latter construction the superadded words of limitation to the issue, and circumstances of B.'s having a child living at the time of the devise, were much insisted on; and upon this distinction it was said, the cases on this subject generally turned.

Per Cur. The general rule to be collected from the decisions is, that the word "issue" in a will is either a word of purchase or of limitation, as will best answer the intention of the deviser, though, in the case of a deed, it is universally taken as a word of purchase. Now in this case there is no doubt about the intention of the deviser, who "devised all his real estate unto his wife for her life and, after her decease, to his daughters A. and B., to be equally divided between them, not as joint tenants, but as tenants in common;" and then he proceeds to show how their issue should take, namely, "the one moiety to his daughter A. and her heirs for ever, and the other moiety to his daughter B. for her life; and, after her decease, to the issue of her body, and their heirs for ever." Now, if the devise of the second moiety be construed to give an estate tail to that daughter, the deviser's estate will not be equally divided; for then the ultimate reversion of the second moiety will be again subdivided between the heirs of the two daughters; and the first daughter and her heirs will take a moiety of this reversion, over and above what they take under the devise of the first moiety. In conformity with the intention of the deviser, we are of opinion that the deviser in this case used "issue" as a word of purchase, and, consequently, that the children of B. took a fee.

2. *DOE, D. LYDE, V. LYDE.* H. T. 1787. K. B. 1 T. R. 593

A case reserved disclosed a bequest of a term to G. for life, and after his decease to M. his wife for life, and after the decease of the survivor, to the children of G. share and share alike; but if G. should die without issue of his body, then to R. for life, and after his decease to N. his wife for life, remainder over. M. and R. died, and then G. died without issue. It was contended, that the limitation to N. was too remote, as being to take effect after an indefinite failure of issue. *Per Cur.* It is a general rule where there is an express limitation of a chattel by words, which if applied to a freehold, would create an express estate tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect. But where there is no such express limitation, the Court will consider the intention of the testator; however, that general principle does not apply to this case, there being no words which in a strict legal sense constitute an estate tail. We must, therefore, look to the intention of the testator, from which it is evident that the remainder over to N. was to take effect on the event of G.'s death without any issue.

(b) *As to where a term is used to which the law has annexed one idea, and common opinion another.*

ROE, D. CONOLLY, V. VERNON. E. T. 1801. K. B. 5 East, 51; S. C. 1 Smith's Rep. 318.

A testator had freehold, customary, and copyhold lands; and after introductory words, as to all his worldly estates, devised two rent-charges out of all his real estate, and also two copyholds in M. for lives; and subject thereto, devised all his freehold manors, lands, &c. in Y. and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line; and, in default of such issue, he devised all his said (freehold) manors, lands, &c. to his eldest daughter in tail male in strict settlement, with

* And, neither an intent manifested by the testator to give only an estate for life; nor the interposition of trustees to preserve contingent remainders; nor mere words of condition, describing the order of succession in which the devises are to take place; nor the introduction of powers of jointuring, or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. It must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent; *Poole v. Poole* 8 B. & P. 627.

ceive the technical meaning which the law has annexed to them, when used in deeds, but are to receive that sense, whether technical or ordinary, which will best effectuate the deviser's intention.*

[140]

Still, in reading a will, reference must always be had to rules of law:

In aid of which rule, are the two following maxims; first, where a term is used to which the

law has annexed one idea, and common opinion another, the latter shall be preferred;

[141]

like remainders to his second and third daughters: and by the residuary clause devised all his manors, lands, &c. either freehold or copyhold, except those in the counties of G. &c. which he had before disposed of subject to the said rent charges, in failure of issue male of his son and himself, to his three daughters, as tenants in common in fee. The question which now occupied the attention of the Court was, whether certain customary estates which the deviser had, with freehold property in G. did not on failure of the male line pass to the eldest daughter under the description of all his freehold manors, lands, &c. in that and other counties. Part of the evidence was adverted to by the Court, who said: although, supposing the freehold of such customary estates be in the tenant and not in the lord, they being holden not at the will of the lord as pure copyholds, but according to the custom of the manor, and the tenants being entitled to the timber and mines, and the estates being demised and demisable in fee simple or otherwise; yet as they are holden by court-roll, and so passed by surrender and admittance, and were generally reputed and called copyholds, and the testator having distinguished in other parts of his will between copyhold and freehold, he must be presumed to have used the word freehold in its usual and popular signification, as not including these customary estates considered by himself as copyholds. In disposing of their property, testators usually advert to the known and ordinary circumstances attending it, and adopt the appellations by which it is generally and more familiarly characterised, and cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates; still less so in the case of a testator consant, as this testator appears to have been, of the proper nature, quality, and denomination of the different species of property he professes to dispose of by his will; for whenever he means to pass copyhold, it will be observed, he always finds it necessary so to describe it. The remaining part of the will furnishes no argument of intent to be drawn from the use of any particular expressions, until we come to the residuary clause, from which it has been contended, that these customary lands pass by the denomination of freehold, from the circumstance of their being undeviseid until after the failure of the issue of the son and the deviser, unless they are comprehended under the description of freehold lands, which it is said he never could have intended from the introduction to his will, where he professes an intent to dispose of all his worldly estate. But in answer to this, it has been justly said, that there will be no intestacy, if the heir at law, according to the case of *Walter v. Drew* (Comyn's Reports, 372), took an estate tail by implication. And it would be carrying the effect of introductory words much further than has been hitherto done, if they are to be so construed; for though they have been holden to ascertain the extent of an estate in lands unquestionably devised, we are not aware of any case which has decided that such introductory words will alter the obvious and natural construction to be put on words used by a testator, which of themselves admit of no doubt, unless indeed the context should necessarily and absolutely require such sense to be put upon them; which is not the case in the present instance.

See Willes, 354.

(c) *Where a term has obtained a definite technical meaning.*

LANE V. STANHOPE. T. T. 1795. K. B. 6 T. R. 345.

Secondly; where the term has obtained a definite technical meaning, it must be presumed that the testator used it in that sense. A case from the Court of Chancery stated that A. was seised of several freehold estates and entitled to a farm containing 390 acres, 230 of which were also freehold, and the remaining 160 had been held for a long course of years by A. and his ancestors under a church lease, renewable. The whole farm as far back as could be traced, had been held together without any distinction as to tenure, and A. leased it for one entire rent. A. by his will gave all his manors, messuages, farms, lands, hereditaments, and real estate, whatsoever and wheresoever, unto B. for life; remainder to trustees to preserve, &c.; remainder to his sons successively in tail male. And, after giving legacies, all the rest and residue of his ready money, rents in arrear, stock, jewels, and personal estate whatsoever, he gave to B. for ever. The question was, whether the word "farms" carried the leasehold? For the plaintiff the principal

case cited and relied on was, *Addis v. Clement*, 2 P. Wms. 455. where Lord Hardwicke on deciding that the leasehold as well as freehold lands passed, relied on the particular words of the devise which were, "all his lands which he then stood seised or possessed of, or any ways interested in, and which were in the possession of A. B." For the defendant, the case of *Pistol v. Richardson*, 1 H. Bl. 26. n. (a) was cited as the case most directly in point: where the testator being seised of freehold estates, and also possessed of two leasehold farms, devised "all his manors, &c. and all and every his several messuages, lands, tenements, and hereditaments, which he was seised of, interested in, or entitled to," to his son for life, with several remainders over. And after the case had been before the Court seven different times, and undergone great consideration, the devise was finally determined not to pass the leasehold property, the question being considered as precluded by the determination in *Rose v. Bartlett*, Cro. Car. 292.

Per Cur. The testator, after devising all his manors, messuages, or tenements, houses, farms, lands, hereditaments, and real estate whatsoever and wheresoever, unto, &c.; added a residuary clause, by which he gave "all the rest and residue of his ready money, rents in arrear, stock in any of the public funds, jewels, and personal estate whatsoever," &c. Now if a person not fettered with legal and technical notions were to read this will, he would not hesitate about the intention, but would say that all the landed property was disposed of by the first clause, and all the personal by the residuary clause. It is our duty, in construing a will, to give effect to the deviser's intention, as far as we can consistently with the rules of the law: not conjecturing, but expounding his will from the words used. However, it is necessary to see that the words used are sufficient to carry that intent into execution. In the first devise, the testator mentions farms, with other words by which his real estates were devised; now unless he means that the farm in question, which was partly freehold and partly leasehold, should pass by this devise, there was no occasion for him to use the word "farm;" because all his freehold property would have passed by the other words. Therefore, it is fair to say that he inserted this word in this first clause for the purpose of passing the farm in question. A strong argument in favour of this construction also arises from the residuary clause, in which he meant to enumerate every thing that he considered as personalty; but he did not mention farms; he only described those things which are generally considered as personalty. In many cases that might be put, we should not lay much stress on the word "farm;" for whether it should have much or little weight must depend upon the subject. The reason why the Court determined in *Addis v. Clement*, that the leasehold farms did not pass by that will, was, because they thought that all the words there used had received in other cases a certain technical construction, and therefore, that they were bound by those decisions. But we have not that difficulty to encounter in this case, because here we find another word in the will, "farms." Besides the Court in the case of *Pistol v. Richardson* decided with reluctance. And we have every reason to believe that if the case of *Addis v. Clement* had been cited, their conclusion would have been different; because Lord Mansfield, C. J., seemed pressed by the authorities to decide against his better judgment.

[143]

6. *As to where there may exist two constructions.*

CHAPMAN v. BROWN. H. T. 1765. K. B. 3 Burr. 1626; affirmed Dom. Proc. 3 Br. P. C. Tomlin's edit. 209. S. P. *MAUDY v. MAUDY*. T. T. 1735. K. B. Ca. Temp. Hard. 142; S. C. 2 Str. 1020; S. C. Barn. 242. S. P. *CARSEY v. WOOD*. T. T. 1677. K. B. T. Raym. 249.

A. B. devised lands to his nephew, C. D., the son of his brother, E. F., for Where a will admits of two constructions, that is to be preferred
and during the term of his natural life, and from and after the death of the said C. D.; then to the first son of the body of the said C. D., and the heirs male of the body of such first son; and, for want of such issue, then to the second, third, fourth, and every other son and sons of the said C. D., according to their seniority; and to the heirs male of the body of such second, &c. and other

which will
render it
valid.*

[144]

sons of the said C. D.; and for want of such issue, to the second son of his brother E. F., for and during the term of his natural life; and from and after the death of the said second son of his brother E. F., then to the first son of the body of such second son of his brother E. F., and to the heirs male of the body of such second son; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of his brother E. F., according to their seniority, and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of E. F. with remainder to the eldest or next son or sons of E. F. for life; and, after his or their deaths, to the heirs male of their bodies. E. F. had no son but C. D. at the time of the testator's death, but afterwards had a second son, named G. H., who died without issue male; and the question was, what estate G. H. took under the will. The Court of King's Bench was of opinion that G. H. took an estate tail. Lord Mansfield said: a court of justice may construe a will, and, from what is expressed, necessarily imply an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions. Lord Hardwicke, though generally liberal in construing the intent of testators, would not supply a contingency omitted in the most favourable case that could exist. "A mother devised her real and personal estate to her daughter who was an only child), and if she die before she is of age to dispose thereof, then devised it over. The daughter lived to be married; and died, leaving a daughter between twenty and twenty-one. Lord Hardwicke decreed for the devisee over, as to the real estate." But if words are rejected, or supplied by construction, it must always be in support of the manifest intent. Here, adding the words would defeat the general intent; which certainly was, that the issue male of the second son of C. D. should take, before it went to the others in remainder. But if the words were added, the limitation by the rules of law would be void; 16 Vin. 461. pl. 2 b.; and vide 3 Co. 51. a; 3 Levinz. 410. A possibility cannot be devised upon a possibility. The intent cannot be effectuated unless the second son of C. D. has an estate tail. The blunder of expression is here favourable to the real meaning, and therefore cannot be supplied by construction; the constant object of which is "to attain the intent." For this purpose, words of limitation shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest. But here, to supply the words omitted by mistake or blunder would introduce a blunder in law, and defeat the testator's general view and intention. As the words stand, the second son of C. D. took an estate tail. The intent of the testator cannot be answered but by giving him an estate tail, therefore the literal construction is most agreeable to the intent, and must prevail.

7. *As to transposing words.*

1. MARSHALL V. HOPKINS. E. T. 1812. K. B. 15 East, 309. S. P. CORE V. RAWLINSON. H. E. 1703. K. B. 1 Salk. 334; S. C. 2 Lord Raym. 831.

Words in a
will may be
transposed,
where the
whole con-
text would
be thereby
rendered
more con-
sistent with
the facts:

A testator being seised, by the same title, of a messuage of nineteen acres, of land, including Floodgate Meadow, in the parish of Mavesyn Ridware; which parish consists of three townships, Mavesyn Ridware, Blythbury, and Hill Ridware; and having other property in Hill Ridware, and no where, else and the messuage in Blythbury, with two of the nineteen acres there, being in the occupation of T. W., and the rest of the nineteen acres, being partly in the occupation of other tenants, and partly in his own; devised "all his messuage, with all lands, hereditaments, and appurtenants thereto belonging, situate in Blythbury, in the parish of M. R., now in the occupation of T. W., except Floodgate Meadow." It was argued that nothing passed by the will except

* As a testator is always rather to be presumed to calculate on the disposition of his will taking effect, than the contrary; and, accordingly, on the same principle, a provision for the death of devisees will not be considered as intended to provide for lapse, if another construction can be put on it; 2 Atk. 375; 4 Ves. 418, 514; 7 id. 586; 1 Ves. & Bea. 422; 1 Price. 264; 1 Swanst. 161; 2 Ves. jun. 501; 1 M'Leland, 168.

the land in Blythbury, which was in the occupation of T. W. at the time of the devise. *Sed per Cur.* The testator had a dwelling-house and nineteen acres of land in Blythbury, all held under the same title, and that all the rest of his property was in the parish of Mavesyn Ridware. The house in Blythbury, with about two of the nineteen acres of land, was in the occupation of T. W.; but the rest of the nineteen acres was occupied apart by himself, and the rest by other tenants. Then, by reading the words "now in the occupation of T. W.," as transposed and applied to the dwelling-house, according to the fact, the whole will be consistent, and all the difficulty as to the exception of the Floodgate Meadow is obviated, the exception of which would otherwise be entirely nugatory, it never having been in the occupation of T. W.* See 8 East, 91; Cro. Eliz. 658; 2 Ch. Ca. 10; Hob. 75; 2 Ves. jun. 32. 248; 17 id. 314.

[145]

2. DOE, D. WOLFE, v ALLCOCK M T. 1817 K. B. 1 B. & A.-137.

The devise in this case was in the following words: "I devise all my hereditaments in S. unto my sister E. T., and to her daughters A. S. and T. T., their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint tenants, *for and during the life of my said sister E. T.*; and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments, *so devised to my said sister for her life as aforesaid*, unto her said two daughters A. S. and T. T., their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." It was contended, that under this devise the daughters of the testator's sister E. T. took estates *pur autre vie* for the life of their mother, as tenants in common; and as to one-third, with remainder in fee to them as tenants in common; leaving the reversion in fee in the other two-thirds undisposed of. But the Court held, that the daughters took estates in fee; and Lord Ellenborough, C. J. said: the testator has thrown together a heap of words, the sense and meaning of which he did not clearly comprehend; but although the language of this will, is confused, and the words are scattered in such a way, as, *if taken in the order in which they stand, they do not convey any meaning*, yet, in favour of common sense, we may take the liberty of transposing them, according to that order, which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labour of the argument has been to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder, whereas his meaning evidently was to dispose of the whole. See 4 T. R. 39.

And the testator's intention.

3. MOSLEY v. MASSEY, M. T. 1806. K. B. 8 East, 149.

[146]

A. B., having an estate in the county of Monmouth, of which he was seised *in fee* in possession, and another estate in the county of Radnor, of which he was also seised in fee, subject to the uses of his marriage settlement, by which he covenanted to convey to the use of himself and his wife for life; remainder to his first and other sons in tail; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle, by his will reciting that he was seised in fee of a messuage and lands at L. in the county of Radnor, and of a moiety of a messuage in the parish of C., in the county of Radnor; and that he was also seised

Another case of transposition some times arises; when a testator has devised lands at A. to B., and

* It may not be unacceptable to those who may peruse the above, to read the following remarks of Mr. Jarman, in his able and learned edition of Powell on Devises, vol. i. p. 372. n.; that the construction adopted by the Court accorded with the intention of the testator, is highly probable; and if, as Lord Ellenborough suggested, the words, taken in the order in which they stood, did not convey any meaning, the established rules of construction clearly authorised the transposition. But the difficulty was, in saying that the words were unmeaning in their actual order; for it is submitted, that the will read in that order, contained a clear and express devise to the three devisees for the life of the mother; remainder as to one third, to the two daughters in fee; and, had the testator deliberately intended to confine his disposition to those estates, he could hardly have expressed himself in more technical or formal language. The construction, indeed, was apparently absurd; but, let it be remembered, that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation; Mason v. Robinson, 2 Sim. & Sta. 295

lands at C. to D., and it appears by the fact of the limitation of each devise being exact ly applicable to his interest in the lands comprised in the other, and other circumstances, that he has mistakenly transposed the lands comprised in the several devises; of the reversion in fee expectant on the death of his wife and of his son, without issue, of lands in the counties of Monmouth and Northumberland (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own), devised his said estate, in the said county of Radnor, to his wife for life; remainder to his only son for life; remainder to his (the son's) sons and daughters in tail in strict settlement; remainder to his own daughter, &c.; and devised the reversion of his said estates in the said county of Monmouth, after the death of his wife and only son without issue, to his daughter, &c. The will, moreover, referred to the lands devised as part of the estate of his late uncle. The facts having thus appeared to the court, from a case sent by the Lord Chancellor, the judges certified to the following effect:—Comparing the devising clause with the recital and the facts, sufficient has appeared to us to enable us to ascertain, beyond a possibility of doubt, that the deviser had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate, in the county of Radnor, although he had respectively misdescribed their local situations. See 1 Leon. 186; 3 id. 165; Sty. 261. 279; 1 Rol. Abr. 614. pl. 4; 1 P. Wms. 287; 2 Bulst. 176; Finch. R. 395. 403; 2 Eq. Ca. Abr. 415. pl. 6; 1 Atk 410; Com. R. 372; Ca. Temp. Talb. 262; 1 Bro. Ch. Ca. 206; Fearn's Ex. Dev. 4th edit. 126; 5 Inst. 51; 1 T. R. 593; 2 id. 676; Amb. 175.

In such case, or if he falls into any similar error, the Court will correct it.

[147]

Words may be supplied in a will, to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context;

Of which rule, the case of Doe

4. DENN, D. WILKINS V. KEMEYS. E. T. 1808. K. B. 9 East, 366. In this case the Court held that freehold might pass by a will, giving the estate a legal description or name, though it be mistakenly called leasehold, there being no other property answering the name and description.

8. *As to supplying words.*

1. DOE, D. LEACH, V. MICKLEM. E. T. 1805. K. B. 6 East, 486; S. C. 2 Smith's Rep. 490.

A testator having two sisters, A. H. and M. J., and also two cousins, F. and G. devised his estate at A. to his sister A. H. for life; remainder to F. in tail; remainder to G. in tail, with remainder over; and then devised another estate at B. to his sister M. J. for life; or, if she should survive his wife and sister A. W., so that she should come into the possession of the estate at A., then to L. J. for life, towards the support of his cousins F. and G.; remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it was therefore contended that the remainder to L. J. and G. failed. But the Court held that, as the word *or so* placed was unintelligible, being referable to no other alternative; and as it was apparent, from the whole context, that the testator had in contemplation another alternative, viz. the death of his sister M. J., and that he meant to make a provision after the death of his sisters, for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail, after a remainder in tail to his brother F., in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read: as a gift to his sister M. J. for life, *and, after her death, or, if she should survive his wife and sister A. W. so that she should come into possession of the estate at A.; then over to L. J. who consequently took a vested remainder, and was entitled in the events which had happened.* See 1 Atk. 43; 2 id. 102; 3 id. 774; Willes, 305; 5 Burr. 2703; Cowp. 40; 1 Eq. Ca. Abr. 245; 2 Freem. 17; 3 T. R. 763; 10 Mod. 402; 2 Ves. 163; 1 Hutton, 119; 6 Ves. jun. 404; 7 T. R. 433; Cro. Car. 180; 15 Ves. 29.

2. DOE, D. WICKHAM, V. TURNER. H. T. 1823; K. B. 2 D. & R. 398.

Ejectment; plea, general issue. It appeared on the trial, that one D. T. made a will, containing many bequests both of real and personal property, in * The same principle, too, has been applied to the objects of a devise; for, it has been held that, where a testatrix having two nieces, Mary, who had never been married, and Ann, who had been married and was dead, leaving two children, bequeathed one moiety in a certain portion of her property to the children of her niece Mary, and the other moiety to her niece Ann, it being evident that the bequest to the children of Mary, was intended for the children of Ann, and that, to Ann, for Mary, the Court corrected the mistake: Amb. 374.

which were the following words: "I give to H. W. a messuage, or tenement, now in the possession of W. Item: I give further unto my nephew H. W. half part of my garden and 100l stock in the 4 per cent. bank annuities. I give further unto my nephew, my yard, stables, cow-house, and all other out-houses in the said yard; my sister, M. W. to have the interest and profits during her natural life." M. W. held possession of the yard, stables, &c. during her life; but, after her death, the father of the defendant, as heir at law of D. T., took them, and by will devised them to the defendant. The learned judge, thinking that the intention of the testator was to give a life estate to M. W., with the reversion to H. W. directed the jury to find a verdict for the lessor of the plaintiff. A rule had been obtained to set aside the verdict, and enter a nonsuit. The Court differed in opinion. The Lord Chief Justice; Bayley and Holroyd, Js., in effect said: without subverting either of the principles that, where an estate for life has been devised without any remainder over, it shall pass to the heir; and that where the language is doubtful, the presumption shall be in his favour; I am of opinion that the lessor of the plaintiff is entitled to these premises, on the ground that it was the intention of the testator to give them to him. We must look, said Lord Kenyon, in all the four corners of the will to find out what is intended. Now, in this will, several bequests are made to different persons, and these bequests are mentioned in continuation; and the word "further" is used only when the second or third thing is given to the same person. The testator must therefore have used the word "further," as one of addition, and, if we add the word "him," then the whole passage is clear and intelligible; but, otherwise, it is nonsense. It is our duty to give the passage a meaning and effect, if one can be found. It may be read as if the words "my sister," &c. were inclosed in a parenthesis. But Best, J. said: I think by adding the word "him," to explain the passage in question, that we are, in effect, making a will for the party; and I think that many wills have been made in a similar manner, quite different from the intention of the parties; but if a word is to be inserted, why not put in the word "to," and then there would be a clear devise to M. W. and a lapse of the remainder, which would necessarily go to the heir. Although I cannot say that the heir is a favourite of the law, in the common meaning of that word; yet, certainly, all presumptions have been given in his favour. If a passage in a will be obscured, we must look to the whole to discover the meaning and intention of the testator, that *quod voluit non dixit*. Now, there is no connexion between this particular estate and that which immediately precedes it. It is probable that, in giving his property to H. W. he would first mention land, then money, and then land again? The word "further," in my opinion, means "likewise," "also," and is not here used as a word of addition. As I think that the heir ought not to be disinherited by ambiguous words, I am in duty bound to express the reasons on which I found that opinion, particularly as it gives me so much pain to differ from the rest of the court.

[148]

3. DUE, D. STEVENS, v. SVELLING. E. T. 1804. K. B. 5 East, 87; S. C. 1 Smith's Rep. 314.

A testator devised to A. B. and C., his wife, certain messuages, lands, and tenements, and all his personal estate, *after having thereout first paid and discharged all his just debts and funeral expences*; also subject to the payment thereof of certain legacies before bequeathed; and he appointed C. executor, to whom he charged with the payment of his just debts, legacies, and funeral expences. One of the points of this case was, whether *thereout* was not referrible solely to the personal estate, the last subject, and, if not, whether the charge upon the real estate enlarged the devisee's interest in it to a fee.

The Court held that the charge extended to the realty, and that the devise carried a fee; and said: the distinction, which runs through the cases seems to be this: that, if an estate in land be given after payment of debts or legacies, it is of no consequence, for this purpose, whether the devisee take the estate for life or in fee; for the land will be charged into whatever hands it may pass, and the purposes of the deviser will equally be answered. If the devisee be

Where, therefore, a testator divided his sections, as placed to the words [149] tion at the end of each section, the

Court considered them as applicable to the several devises contained in it. personally charged with the payment of debts, or if the debts be charged on the *quantum* of the estate given to the devisee, he must take the fee; otherwise, if he only take for life, he may be a loser, or the estate may be insufficient. Here the devise of the estates in question, and also of the personalty, is all contained in the same clause; for the words "I give and bequeath" are not repeated before that branch of it disposing of the personalty, and then the clause concludes, with charging the *devisees* with payment *thereout* of the debts and legacies. Now, the word *thereout* means out of the property before given to the devisees. What then was the property so given? All at least which was before included in the same sentence. Being, therefore, clear that the debts, &c. were personal charges upon the devisees, in respect of the property devised to them, and that they must take an estate commensurate with the charges, which they cannot be certainly assured of, without taking a fee in the lands, we must hold that A. B. and C. took a fee in the real estate devised to them. See 5 T. R. 13, 564; Cro. Eliz: 330; 2 Atk. 341; 3 T. R. 356; Salk. 239; 8 T. R. 1; 2 B. & P. 247; 3 Burr. 1533; 4 East, 496.

4. RIGHT, D. COMPTON, V. COMPTON. H. T. 1808. K. B. 9 East, 267.

But words cannot be supplied on mere conjecture, in order to equalize the estates of several devisees created by distinct and independent devises, where there is no uniformity of purpose expressed.*
[180]

A testator having a son married, and six grandsons and three grand-daughters, and three farms, devised *all* his lands to his son *for life*; and after his death gave to his eldest grandson, Thomas, the defendant in this action (of ejectment), the north side of Down Farm, and to his grand-daughter, Frances, the south side of the said farm, and to his grandsons, George and Edmund, and his grand-daughter, Elizabeth, "the upper part of Lain Farm, equally between them, so long as they should remain single; but, if either married, *then to have paid, by the other two, 10l. a year, for his or her life*;" and to his grandsons, Edward and John, and his grand-daughters, Mary and Ann, "the lower part of Lain Farm, equally between them, so long as they remained single; but if either of them married, this 10l. a year (not saying to be paid by the other) for his or their life;" and then gave the third farm to another grandson. The testator also gave unto his son's wife 5l. a year out of such of the said farms, if she should survive him. Edward, Mary, and Ann, married.—Their co-devisee (John), of the lower part of Lain Farm, who remained single, claimed the three-fourths of the farm forfeited by their marriage. It was urged that the defendant was not entitled to the three-fourths of the land in question, and considerable reliance was placed on the expression used in the devise of the upper part of the Lain Farm, which provides that, if either of the devisees of that part should marry, they should have paid, *by the other two, 10l. a year during his life*; contending that the words "to have paid them by the other," used in the clause respecting the upper part of the Lain Farm, and omitted in the devise in question, and which had the effect of enlarging the estate of the devisees of that farm to a fee, must be supplied in that devise.

Sed per Cur. That the exposition of every will must be founded on the whole instrument, and be made *ex anteceditibus et consequentibus*, is one of the most prominent canons of testamentary construction; yet, when between parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase, or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, *perfect in itself and without ambiguity*, and not militating with any other provision respecting the same subject matter, notwithstanding that a more probable disposition for the testator to have made,

* Where a testator gave several pecuniary bequests, beginning each with *Item*: "Item;" she devised a messuage to J. E.; and, after his demise, she then proceeded as follows. "Item. I give and bequeath unto M. W. all that my messuage, or dwelling-house, wherein I now dwell, with the garden and all the appurtenances thereunto belonging; and I also give unto the said M. W. all my household goods and chattels, and implements of household, within doors and without, *all for her own disposing free will and pleasure*, immediately after my decease." It was held that the words in *Italics* were confined to the last section of the clause, and, consequently, that the devisee took only an estate for life in the messuage.

may be collected from such assisted construction. Both clauses are distinct and independent; there are no words of reference to connect them, and without connecting them, no such clear unambiguous intention can be collected from implication, as is necessary to disinherit the heir at law. Besides, if on the marriage of the several devisees, their shares should be held to go over to those who should remain single, and in no event to the heir at law, that devisee who remained longest single, though he should ultimately marry, would take a fee in the shares of all the others, notwithstanding his having done that which determined the estates of his brothers and sisters, which the testator hardly could have intended. An argument might be, perhaps, *prima facie*, derived from the charge of 5*l.* per annum in favour of the testator's son's wife, if she should outlive him. But it must be observed, that here is no *personal* charge on the devisees, nor a charge on the *estates given to them*, which might furnish an inference that the intent of the testator was, that the unmarried devisees should take the shares of those who might marry, from the improbability of his meaning being, that a burthen should be thrown on those who might remain single, by the conduct of the others in marrying. We are therefore of opinion that the lessor of the plaintiff took no estate in the three-fourths of the lower part of the Lain Farm, and that the *postea* must be delivered to the defendant. See 8 T. R. 64. 118; 1 N. R. 335; 7 East, 259; 14 Ves. 364.

5. *DOE, D. CHILD, v. WRIGHT.* M. T. 1798. K. B. 8 T. R. 64. S. P. *DOE, D. WRIGHT, v. CHILD.* T. T. 1805. C. P. 1 N. R. 335. S. P. *DOE, D. PHIPPS v. LORD MULGRAVE.* T. T. 1793. K. B. 5 T. R. 320. S. P. *WRIGHT v. HOLFORD.* E. T. 1775. K. B. Loff. 444.

The testator, after devising to his wife for life, proceeded: and after her natural life I give and devise unto my grandson, J. W., all my lands, freehold, copyhold, and leasehold, in the county of E.; and also I give and devise unto my grandson, J. W., all my estate, freehold and copyhold, lying and being in H. For the plaintiff it was contended, J. W. took an estate for life, and that upon his decease it descended to the heir at law. For the defendant it was argued, that J. W. took an estate in fee. Though it reasonably
[151]
be conjectured that
he had the same inten-
tion as to
all.

Per Cur. From the words in this will we are of opinion that J. W. takes an estate for life. In *Ibbotson v. Beckwith*, Ca. Temp. Talb. 157. it was said, that general introductory words in a will, like those used in this instance, showed that the testator had his whole estate in view at the time; but it is now settled that those words are not of themselves sufficient to carry a fee. Perhaps it would be too critical to advert to particular expressions in a will of this kind, drawn by a person ignorant of the profession: but it is observable, that in almost all the other clauses of the will, the testator used the word "estate," which is sufficient to pass a fee. He has not, however, used that word in the clause on which this question arises, nor any word equivalent to it; and there is no part of the will that enables us to decide, consistently with the authorities that J. W. took a fee in the premises in question.

9. *As to changing words.*

FAIRFIELD v. MORGAN. M. T. 1805. C. P. 2. N. R. 38. S. P. *EASTMAN v. BAKER.* H. T. 1808. C. P. 1 Taunt. 174.

A. being seised of lands holden upon leases for lives, devised to B., his brother, all his real and freehold estates, subject to an annuity to his mother for her life; "but in case B. should die before he attained the age of 21 years, or without issue living at his death," to his mother forever. A. died; B. attained the age of 21, and then died without issue. The Court held that the word *conjunctively*, or must be construed as and, and the mother took nothing upon the death of B. See 1 And. 161; Owen, 52; 1 Leon. 74. 243; Gouldb. 71; Co. Litt. 225. a; Cro. Eliz. 270. 525; 1 Rol. Rep. 310; 2 Brownl. 225; Moore, 422; Nov. 64; Pollexf. 615; 2 St. 1175; 3 Atk. 193; 9 Mod. 444; 2 Ves. 243; 3 T. R. 470; 1 Ld. Raym. 505; 2 Vern. 388; 3 Burr. 1626; 3 T. R. 85; 6 id. 30. Words of
conjunction
in a will
may be con-
strued dis-
junctively,
and vice
versa,
when it is
required to
effectuate
the testa-
tor's inten-
tion.

10. *As to rejecting words.*

DENNE D BRIDGON, v. PAGE. M. T. 1783 K. B. 11 East, 603. n. S. P. Doe,
D. CONNERRACH, v. FERRY. M. T. 1789. K. B. 3 T. R. 484.

Words can not be re-
jected in a
will, unless
it be clear
that by so
doing, ef-
fect is given
to the devi-
sor's inten-
tion.
[152]

The limitations of a will were, to the first and other sons in tail male, in strict settlement; and, in default of such issue, to all and every the daughters (without words of limitation;) and, in default of such issue; over. Lord Mansfield held, that the daughters took for life only, although it was urged that they were entitled to a greater estate. His Lordship said: the Courts have been astute to find out, if possible, from other parts of a will, what testator's really intend; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention. The question then comes to this: whether there be enough upon the face of the will to say certainly what the testator's intention was in this case; for we must not go upon conjecture. I conjecture, indeed, that this was a blunder, or slip, and that another limitation was intended; but I do not know what limitation, whether to the heirs general or special. Is there any authority which will enable us to supply the defect, and make another will. If, after the limitation to the daughters of J. N., the words had been, "and if they die without issue," we would have implied an estate tail; but here the words are, "for default of such issue," which can only mean the issue mentioned before. The Court have no power to strike out the word "such;" and if they did, what are they to supply it with; tail general, or tail male? That shows there is no intention apparent on the will for the Court to go upon.

11. *As to where the same words occur twice.*

GOODRIGHT, D. DOCKING, v. DUNHAM. M. T. 1799. K. B. 1 Doug. 264.

Words oc-
curring
more than
once in a
will, shall
be presum-
ed to be us-
ed in the
same sense,
unless a
contrary in-
tention ap-
pear from
the context.
Where the
ends con-
templated
by distinct
devises in a
will are sep-
arate and
disjoined,
and there is
no connec-
tion by ref-
erence be-
tween them
the one can
not be ad-
duced in aid
of the con-
struction of
the other.
[153]

A. B. devised to his son, J. L., for life, and after his death to all and every his children equally, and their heirs; and in case his said son died without issue, he gave the premises unto his (the testator's) two daughters and their heirs. Lord Mansfield held it to be clear that the limitation over, was the same, as if it were, "in case my said son die without children;" and said; the word heir in the limitations over to the daughters, certainly does not mean "heirs of the body;" and we cannot give the same words two different senses in different parts of the same will.

4th. *As to the different clauses being explanatory.*

1. GOODRIGHT, D. DREWRY, v. BARRON. E. T. 1809. K. B. 11 East, 220.

After introductory words "as touching the testator's wordly estate," &c. he devised a cottage, house, &c. to A. and his heirs, and also gave to B. whom he made his executor, "all and singular his lands, messuages, and tenements, by her freely to be possessed and enjoyed." The question was, what estate B. took under the devise. Reliance was placed on the introductory words as a circumstance, conjoined with the others, to show a clear intention to pass the fee. *Sed Per Cur.* B. took only an estate for life. There are no express words giving her a greater estate, and no such intention is necessarily to be implied either from the introductory words, or from the words, "by her freely to be possessed and enjoyed." With respect to the introductory words, it has been held in many cases that they are not sufficient of themselves to carry a fee, but *juncta jurant*. The word estate, used in the introductory clause, is completely disjoined from the devise in question, and cannot be brought down to join in with the latter clause without doing violence to the words. Then, as to the words used in the clause itself, they may mean free of incumbrances, or the molestation of any other, during the period of her own possession and enjoyment. See Willes, 141; 8 T. R. 64. 197; 8 East, 141; Cowp. 356.

2. FENNY v. EUSTACE. E. T. 1815 K. B. 4 M. & S. 58. S. P. RIGHT D.

COMPTON, v. COMPTON. H. T. 1808. K. B. 9 East, 267.

On the con-
trary, if
there be
nothing in
the context
of a will to
connect it,
J. C. devised, 1st, to his wife all his goods, &c. to her and her heirs; and also three cow-commons to her and her heirs; 2d, to his two nephews all that piece of land called P.; also to his said nephews all that piece of land called L. to be equally divided between them as tenants in common, and to their several heirs and assigns for ever; 3d, he devised thus—"I give unto my nephew J. C. all that my house and premises at P.; I also give unto my nephew J. C.

all that my land in P. and R. to him, his heirs and assigns for ever." The different question was, whether, under the terms of the devise J. C. took an estate in fee, or for life only, in the house and premises at P. clauses must be taken separately.

Per Cur We are of opinion that J. C. took an estate in fee; for although undoubtedly, if there be nothing in the context to connect the different clauses of a will together, they must be taken separately; yet here the arrangement of the will points out the connection which the testator intended; the numerical divisions clearly showing, that by the phraseology used both in the second and third clauses, the testator meant to describe first, the persons and property which were the subject of his devise; and, by reserving to the close of the entire sentence the words of limitation, to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence. See 1 Atk. 456; 8 T. R. 64; Cro. Car 308; 1 Salk. 239.

3. MEREDITH V. MEREDITH. H. T. 1809. K. B. 10 East, 503.

A. B. devised certain tenements to B. by name, for her life, provided that But in this if C. and D. to whom and to whose children the reversion and inheritance of ca-e. the the premises were intended, if B. should die without issue) should give B. limitations in one 1000*l.* for her life estate; then the testator devised all and singular the said estate and premises called M. to C. and D. for their lives, share and share alike and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common &c. drawn to, and incorporated with, another, by reason of the words, as *aforsaid* provided that if B. should die in possession of the premises single and without issue, then he gave the said estates and premises to C. and D. and to the issue of their bodies lawfully begotten or to be begotten, and their heirs as tenants in common as *aforsaid*. It was contended, that the second clause or proviso in the will which applied to B.'s dying in possession of the estates must be coupled said. with the first clause, and particularly by reason of the words *as aforsaid*, which are used at the end of the second clause; and that the testator intended by the second clause that C. and D. respectively and their children should take the same interests in the event of B.'s dying in possession, as were expressed in the first clause, in the event of the 1000*l.* being paid to her; and, consequently, that under the limitations expressed in the first clause, C. and D. took estates for life as tenants in common with remainder to their respective children as tenants in common in fee of a moiety; with a remainder over of C.'s moiety, on failure of his children, to the children, of D. as tenants in common in fee. The Court certified this opinion, the case having been sent by the Master of the Rolls, but previously said: such appears to us to be the proper mode of treating the case. The words *as aforsaid* in the second clause necessarily draw down and incorporate the words in the former clause. C. and D. and their issue, &c. are to take in the event of B. dying in possession, unmarried and without issue, as tenants in common as *aforsaid*. To say that these latter words only meant that they were to take as tenants in common in their respective moieties, is to give no meaning to the words *as aforsaid*, but to make this a mere useless repetition. See 2 Lev. 223; 1 Ves. 111; 2 Ld. Raym. 1561; Cowp. 309. [151]

5th. As to false additions, or mistakes.

1. DOE, D. HUMPHREYS, V. ROBERTS. H. T. 1822. K. B. 5 B. & A. 407. S. P. MOSELY V MASSEY. M. T. 1806. K. B. 8 East, 149. S. P. DANN, D. WILKINS, V. KEMEYS. E. T. 1808. K. B. 9 East, 365.

By the term of a will, a testator devised all his messuage, or dwelling-house, with the appurtenances, in High-street, in the town of H., and all and every his buildings and hereditaments in the same street, to his mother for life, and, after her death, to C. D. It was proved that the testator had only one house in the High-street; but that behind that house he had two cottages fronting a lane, called Bakehouse-lane, the only entrance into it being from the High-street. It was contended that the two cottages did not pass under the will. When it is apparent on the face of the will, that a local description is mistaken, the Court will correct it.

Sed per Cur The testator speaks of some other tenements in the High-street besides the principal messuage. The only way to these cottages was through the High-street; and there was no thoroughfare through Bakehouse-

lane. If there had been an opening from the High-street to these two cottages alone, they would clearly be in the street; and we can see no difference, from the circumstance of there being other houses in the court. And, as there is no other property to satisfy the will, we are of opinion that these cottages ought to pass.

2. *DOE, D. HARRIS, v GREATHEAD. M. T. 1806. K. B. 8 East, 91.*

And the addition to a devise, in itself precise and definite of a circumstance, false or mistaken will have no effect.

[155]

A. B. having purchased of A. the manor and certain lands of and in Hampreston, in the counties of Dorset and Hants, and, having settled a rent-charge on his wife out of his manor of Hampreston, in the county of Dorset, and all other his lands, &c., in Hampreston, aforesaid, which he bought of A.; and having afterwards purchased of other persons, other lands in Hampreston, Hants: which were near to another estate of his, called Uddens in Dorset, by his will reciting and confirming the settlement, devised to trustees, "the said manor, &c. and other hereditaments, of and in Hampreston aforesaid, and all other the manors, lands, farms, &c. and other hereditaments, in or near Uddens aforesaid, or elsewhere in the said of Dorset," to trustees, for different uses; amongst others, giving his wife an additional rent-charge, payable out of "the manors and hereditaments in the said county of Dorset;" and, as to all and singular "the said manors and other hereditaments, in the said county of Dorset, with their appurtenants, &c., charged as aforesaid," he devised the same to the first and other sons of his body; remainder to his daughters, in strict settlement; and, if all but one of his daughters died without issue, "then, as to the entirety of the said manors and other hereditaments" to the daughters of his remaining daughter, in tail, &c.; remainder to the lessor of the plaintiff, his nephew and heir at law; remainder to his sons and daughters in strict settlement; remainder over to other junior nephews in like manner, with power to the trustees to raise money on the security of the manors and other hereditaments, in the said county of Dorset, and also "to sell the devised lands, except such as were situate at Uddens, or Hampreston, aforesaid, and to purchase other lands in fee within the said manor of Hampreston, in the said county of Dorset," &c. The deviser, by a subsequent codicil, in which he spoke of the prior devise of his Dorsetshire estate, revoked the devise to the lessor of the plaintiff. The question was, whether or not, there being no probable reason *a priori* to presume that the deviser had contemplated any distinction between such part of his Hampreston estate as lay within the county of Hants, and such part of his Hampreston estate as lay within the county of Dorset, the words of the will were capable of including the former, inasmuch as the description of the subject-matter of the devise appeared, in the terms of it, to be confined to lands purchased of A. (which the premises in question were not,) or to lands lying in the county of Dorset. On behalf of the defendant were urged, the highly probable intent of the deviser, from the connexion and local unity of the premises in dispute with the body of his estate in Dorsetshire; the situation of them within the general local ambit of the latter county, in the legal boundary of which county the great mass of the estate lay, which might give occasion, or common parlance, to designate the whole as his Dorsetshire estate, circumstances which, though *dehors* the will, might be taken in aid to discover his intent; the sufficient designation of the premises, either as "hereditaments of and in Hampreston aforesaid, or as near Uddens" which is a distinct description from the ensuing words "or elsewhere, in the county of Dorset;" the power to the trustees to sell, except in Hampreston, and to purchase other lands there; and, lastly, the revocation of the first devise to the heir at law. *Per Cur.* By the first part of the devise, the testator having recited the settlement on his marriage, of the manor of Hampreston, and other lands lately bought of A. confines the devise to what he had so bought, by using the words *said manor and hereditaments aforesaid*; and, if we were to hold that this devise would pass lands not bought of A. (and those in question were not bought of him,) we should alter his expressions, render the recital useless, and comprehend that which he has in terms excluded. The latter part of it is in these terms: "And all and singular other the manors, &c., and other heredita-

ments, situate, lying, and being in or near *Uddens aforesaid*, or elsewhere in the county of Dorset," which words, we think, confine the devise to lands in Dorsetshire; for, had the testator meant that all his lands near *Uddens* should pass, in whatever county they might happen to be situate, it would have been sufficient to have said "near *Uddens aforesaid*," to ascertain which, the county was not necessary; and the natural construction of the words "or elsewhere in the county of Dorset," is to restrain the devise to lands in Dorset, as if the expression had been "all other lands in the county of Dorset, near *Uddens aforesaid*, or in any other place in that county." As to the argument founded on the circumstance of the lands in question being in parts of Hants, lying within the general boundary of Dorset, the answer given by the counsel of the plaintiff, we think, is a good one, viz. that, where lands are spoken of as lying in a county, it is meant that they are a part of that county. Such seems to me the proper construction of the will before the Court, collected from the intent of the testator, as evidenced by the words he has used as applied to the subject-matter, without travelling into matters collateral and foreign to the devise. —Judgment must, therefore, be given for the plaintiff.

[156]

See *Plow.* 192; *Bro Abr.* Annuity Pl. 3; *Equity* Pl. 4; *Vaugh.* 262; 1 *N. R.* 345; *Willes*, 141. 309; *Shep. Touch.* 87, pl. 3; 6 *T. R.* 498; *Cro. Jac.* 22. 50; 3 *Atk.* 136; *Dy.* 87. a. pl. 101; 2 *Burr.* 1019. 1010; 1 *Bl. Rep.* 255; *Dy.* 291. a.

6th. As to where inconvenience, or absurdity, would accrue from the construction of a devise.*

7th. As to the admission of *parol evidence*.

1. *BERTIE v. FALKLAND.* H. P. 1697. K. B. 1 *Salk.* 231. S. P. *GOODRIGHT v. CORNISH.* H. T. 1693. K. B. 1 *Salk.* 226; S. C. 1 *Ld. Raym.* 3.

Papers and writings were offered in evidence to prove what was said to be the intention of a testator. But it was decreed that they should not influence the construction of a will in writing, for that would be to make them part of the will itself. And it is expressly required, by the statute of frauds, that every part of a will shall be in writing.

No averment is admitted to explain devises.

2. *HAY v. COVENTRY.* H. T. 1789. K. B. 3 *T. R.* 83.

R. W. being seised in fee of the premises in question, devised them to trustees upon trust that they should stand seised thereof to the use of his grandson G. for life; remainder to his first and other sons in tail male; remainder to C. for life; remainder to her first and other sons in tail male, and, in default of such issue, to the use of all and every the daughter and daughters of the body of C., lawfully issuing, as tenants in common, and not as joint-tenants, and, in default of such issue, to the use and behalf of his own right heirs for ever." C had one daughter, H. and the question was, what estate she took under this devise. *Per Cur.* The testator has used no words testifying his intention to give an estate of inheritance to the daughters, and we cannot supply them. The plaintiff's argument goes to shew that the daughters took estates tail in general; but that could not have been the intention of the devisor, as no such estate is given by any part of the will; and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, technically considered, only confer an estate for life on H.

The intention of the testator must be gathered from the words used in the will; [157]

3. *ROE, D. HICK, v. DRING.* E. T. 1814. K. B. 2 *M. & S.* 448. S. P. *SMITH v. MILFORD.* T. T. 1692. K. B. 4 *Mod.* 131; S. C. 1 *Show.* 350; S. C. 1 *Salk.* 225; S. C. *Comb.* 195. S. P. *COLE v. RAWLINSON.* H. T. 1703. K. B. 1 *Salk.* 235; S. C. 2 *Ld. Raym.* 831.

In this case there was a devise of all and singular the testator's effects, of

And cannot be collected from

* The inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are ambiguous; (*Deffis v. Goldschmid*, 1 *Mer.* 417; *Mason v. Robinson*, 2 *Sim. & Stu.* 295.) Nor is this fact that the testator did not foresee all the consequences of it, a reason for varying it; (*Driver v. Frank*, 3 *M. & S.* 37; *Smith v. Streetfield*, 1 *Mer.* 358; but, where the intention is obscured by conflicting expressions, it is to be thought rather in a rational and consistent, than an irrational and inconsistent, purpose; (*Jenkins v. Herries*, 4 *Madd.* 67; *Andrews v. Parlington*, 3 *B. C. C.* 401.

matter *de*
hors.

what nature or kind soever. The question was, whether the real estate passed under these words. The court said, there is not any case in which the word *effects per se*, has been holden to pass real property. There are many cases where the word is used; and, being a word of an equivocal nature, it may be made to pass the real, or may be confined to personal property. Here however, are no introductory words showing an intention in the testator to dispose of the whole. The probability is, indeed, in almost all cases, that the testator means to pass the whole of his property; but that is not enough, unless he use words to show clearly that he so intends. In the case before us, the preceding words are, *all and singular*, which, to a certain degree, are words of divisions, and perhaps, upon a critical examination, have reference rather to a chattel interest than the entire interest in lands. Then follow of *what nature or kind soever*, which we are not aware have ever been decided, to enlarge the sense of *effects* beyond its natural import, and make it comprehend the real estate. The words used, we must therefore hold, are not sufficiently clear and explicit to that intent, and to disinherit the heir at law. See 12 East, 246; 1 East, 37, n. b.; 2 N. R. 221; 14 East, 372; 1 M. R. 12; Cowp. 304; 1 Bro. Ch. Ca. 437; 3 East, 116; 6 T. R. 610.

4. HARBURGHAM V VINCENT. M. T. 1792. K. B. 5 T. R. 92.

A series of
limitations
in part, cre-
ated in a
will, and,
in part, in a
deed, can
not be there-
fore coup-
led together
[158]
er, and
have the
same effect
as if they
were con-
tained in
the same
document.

It was stated in a feigned issue, that T. H. by will duly attested, devised his freehold estates to five trustees, and the survivors and survivor of them, their and his heirs and assigns, to the use of his grand-daughter, for life; remainder to her first and other sons in tail male; remainder to her daughters, as tenants in common, in tail general; remainder unto, or for the use of such person or persons, and for such estate or estates as he, by any deed or instrument to be executed by him, and attested by two or more credible witnesses, should direct, limit, or appoint. The deviser, by a deed poll dated the day after, under his hand and seal, attested by two witnesses, after reciting his will in pursuance of the power thereby reserved to him, limited and appointed his estates, after the death of his grand-daughter, and failure of her issue, to the first and other sons of his son, &c. A question was made, whether the two instruments, taken together, were, at the time of the death of the deviser, sufficient to pass any estate or interest in the freehold premises not given by the first instrument. The Court certified their opinion, that the two instruments together were not sufficient to pass any estate or interest in the freehold premises not given by the first instrument. on the ground that the second instrument was a deed, and not a will. They referred to the cases of *Moore v. Parker*, 1 Ld. Raym. 37; *Goodman v. Goodright*, 2 Burr. 873; and *Doe, d. Fonnereau, v. Fonnereau*, Doug. 487.

5. GOODRIGHT, D. LAMB V. PEARS. E. T. 1809. K. B. 11 East, 58.

Though, in
the case of
a copyhold
devise, a
mis-descrip-
tion in the
will may be
corrected,
by refer-
ence to the
surrender to
the use of
it.

A copyholder surrendered "his copyhold cottage, with a croft adjoining, and a common right, &c. belonging to the same, all which premises according to the surrender) were then in his own possession." On the same day he devised "all his copyhold cottage and premises then in his own possession." It appeared in fact, that the croft, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of the tenant at the time. It was contended, that the croft mentioned particularly in the surrender, but omitted to be so mentioned in the will, and which was in fact let to, and in the possession of another person, did not pass to the widow under the description of "his copyhold cottage and premises then in his own possession," though it was admitted, that if the croft had been in his possession, it would have passed under these words. But the Court were of opinion, that the latter words were a mere misdescription, copied probably from the words of the surrender, which misdescribed the fact; and that the former words, "copyhold cottage and premises," were sufficiently certain to carry the croft, which formed part of those premises.

6. THOMAS V. THOMAS. E. T. 1796. K. B. 6 T. R. 671.

And, in
deed, in all
cases, an a

The testator devised, "I give to my grand-daughter, E. E., of M. parish, 40l.—*Item*. I give to my grand-daughter, M. T., of L., in M. parish, the re-

version of the house in Water-street." At the time of his death the devisor had a grand-daughter named E. E. who lived at L., in M. parish, and a great grand-daughter, M. T., who lived in another parish, some miles distant from M., in which latter parish she had never been in her life. At the trial of the question, whether either, and which of these two, or the heir at law, were entitled? Lawrence, J., admitted evidence that, when the will was read over by the attorney, testator said there was a mistake in the name of the devisee; but that on the attorney's saying he would rectify it, he replied, there was no occasion, as the place of abode and parish would suffice. Lawrence, J., however rejected testimony of declarations by the testator at other times previously to his will; of his regard for M. T., and his intention to give her the house in question.—Verdict for the heir, subject to the opinion of the Court of K. B., who confirmed it. In delivering their opinion, the other judges concurred with Lawrence, J., both as to the admission of the former and the rejection of the latter testimony. The former, they said, was properly let in, agreeably to a known rule, to explain a latent ambiguity in the will by relating what passed when it was made; but a will was never to be construed by declarations prior to its making. See 1 Atk. 411; 2 Ves. 217; 1 Eden. 38.

7. JONES v. NEWMAN. T. T. 1752. K. B. 1 Bl. Rep. 60.

Motion for a new trial in ejectment, wherein the lessor of the plaintiff was heir at law, and the defendant's title arose upon a will, which devised the premises to A. B., of C., under whom the defendant claimed. The plaintiff gave evidence, that at the time of making the will there were two A. Bs., father and son; and therefore the devise was to the father, who died before the testatrix, and so the devise was lapsed and void; upon which the defendant offered to prove, by parol evidence, that the testatrix intended to leave it to A. B., the son. But the judge would not suffer it, and a verdict was found for the plaintiff. *Per Cur.* The objection arose from parol evidence, and ought to be encountered by the same.

8th. *As to how far the construction of a devise may be varied by subsequent events.**

(B) IN PARTICULAR.

1st. *With reference to the creation of a devise.*

1. HODGKINSON v. STAR. Cited 1 Ld. Raym. 187. S. P. BAKER v. WALL. E.

T. 1697. K. B. Ld. Raym. 186. S. P. WRIGHT v. WIVELL. T. T. 1688. C. P. 3 Lev. 259; S. C. 2 Vent. 56.

A. seised of lands in fee, and having issue two sons, B. and C., devised several estates to B., his eldest son, and directed that B. should renounce all his right in Blackacre, of which the devisor was then seised, to C. This was adjudged to amount to a devise to C. in fee. See Bro. Abr. Devise, Pl. 48; 1 Dow, 102.

2. GREEN v. FROUD. 3 Keb. 310; S. C. 1 Mod. 117. S. P. LESSEE OF CLYMER AND LITTLER. 1 Bl. Rep. 345.

The plaintiff's title was by the will of F., which was entitled "Articles of Agreement," and began thus:—"It is agreed between the said N. and W., that par that N., being sick in body, gives, &c., in consideration whereof, the said W. promises to pay several legacies;" and the conclusion was, "in witness whereof the parties have hereunto interchangeably set their hands and seal;" and this was delivered as an act and deed. The question was, whether this instrument was revokable, which depended on its being considered in law as a will, or as a deed; and it was contended that it was of the latter species of conveyance, being delivered as such. *Sed per Cur.* There being directions given to make a will, and a person sent for to that end and purpose, this was a good will.

* The construction is not to be varied by events subsequent to the execution; (Clare v. an actual Clare, Cases Temp. Talb. 21; Hutchinson v. Atkinson, 3 P. W. 259; Warner v. White, 11 East, 558. n.; Jee v. Audley, 1 Cox, 324; Moggridge v. Thackwell, 1 Ves. jun. 475.)

† And in the case of Habergham v. Vincent, 5 T. R. 92; 2 Ves. jun. 204; Lord Loughborough. Mr. J. Buller, and Mr. J. Wilson, held, that a deed-poll, which was intended to operate after the death of the person who made it, and who had already published his will, made of it as a deed.†

And a will
may be
made by
several dis-
tinct memo-
randums.*

3. CARLETON, D. GRIEFIN, v. GRIFFIN. E. T. 1758. K. B. 1 Burr. 549.

A. B., the deviser, wrote upon a sheet of paper with his own hand as follows: "Know all men by these presents, that I, A. B., &c. make the after-mentioned my last will and testament, &c.;" and after devising lands and chattels, concluded thus: "I pray God to bless and direct my wife, &c. &c. And this is my last will and not any other. 2d day of May, 1752." And the deviser subscribed it at the same time that he wrote it. But this part was neither sealed or attested. A. B. afterwards wrote on the same sheet of paper the following words, viz. "Memorandum, Blackman-street, 5th January, 1754. Whereas, I have laid out, &c. on a lighter, &c., and the barge called the Lemon, &c. All shall be at my present wife's disposal; and this is not to disannul any of the former part made by me, the 2d May, 1752, except that my wife shall not be liable to pay to my son John, &c. Witness my hand, A. B., senior." The first part was written on the first and second sides of a sheet of paper, and the memorandum was began either upon the end of the second or the beginning of the third, and written upon the third side; this was subscribed, and the whole delivered in the presence of the three witnesses. It became material (with a view to another question, to decide whether this was to be considered as one entire instrument, or as two distinct instruments, viz. a will and a codicil. And the Court were of opinion that this was one entire instrument, and the latter memorandum a continuation of the former act; for the testator himself called it a memorandum, and declared "that he did not mean thereby to disannul any part of his former devise or dispositions." After he had written the former part, he took up the consideration of something further that had occurred to him, and it was not material whether he did that at two days' or two years' distance from writing the former part. A man was not obliged to make his whole will at the same time.

[161]

A testator
may also
make sever-
al partial
and particu-
lar disposi-
tions, relat-
ing to sever-
al parts of
his estate,
by distinct
instru-
ments.†

4. HITCHINS v. BASSET. M. T. 1687. K. B. 1 Show. 545.

From a decision cited by Serjeant Maynard in this case, and agreed to by counsel on the other side; it appeared, that where H., seized of lands in Blackfriars, and also of other lands, made a will, and thereby devised the former lands to the hospital of B. in Smithfield; and afterwards made another will, and devised lands he had elsewhere to C.; it was held by all the judges that both wills, being of divers things, might stand together.

5. WRIGHT v. WIVELL. T. T. 1688. C. P. 2 Vent. 56. S. P. RIGHT v. HAMMOND. M. T. 1730. K. B. 1 Com. 292; S. C. 1 Str. 427; 9 Vin. Abr. 110. pl. 32.

A more re-
cital in a
will does
not, howev-
er, operate
as a de-
vise.‡

A testator bequeathed unto A., his wife, 600*l.* to be paid to W., saying it was for payment of lands lately purchased of W. and was already *estated as part of a jointure to A., his wife, during her life*, being of the value of 67*l.* per annum; that of Wiskow, York, and Malton, the lands there amounting to the yearly value of 63*l.*, in all 130*l.*, *which being also stated upon A., his wife, was in full of her jointure.* It appeared that these lands had not been settled on the wife. And it was held by Pollexfen, C. J., Rokeby, and Ventris (Powell, J., *dissentiente*.) that these expressions did not amount to a devise to her; to which it referred, should be considered as a codicil; see 3 Price, 318; 1 Ves. sen. 132; and Powell on Dev. by Mr. Jarman, vol. i. p. 11, n.

* So, it may be made on several sheets of paper, and the law does not require that they should be affixed together; 1 Show. 69; Comb. 174; and where one sheet of a will was found in Essex, and another in Hertfordshire, it was agreed before the statute of frauds, that both sheets made but one will; Earl of Essex's case, cited 1 Show. 69; Comb. 174.

† And as a man that hath several real estates may devise them by several and distinct wills, so likewise he may make several devises of different interests in one and the same estate; Cro. Eliz. 721; and a will may be made to take effect, with reference to another instrument; Cro. Jac. 144; Noy, 117; 1 P. Wms. 530; and, as a man may make several wills of distinct parts of his land or distinct interests therein, so, likewise, may he make one or more codicils, altering, explaining, adding to, or subtracting from, what has been before devised; or devising parts of his land not given by his will; and the law will annex such codicil or codicils to his will, and consider the whole as one instrument; Fuller v. Hooper, 2 Ves. sen. 242.

‡ It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which he has *not* made, the Court will regard it as an inadvertent omission, and

for it appeared that the testator did not intend to devise her any thing by the will, for he mentions that she was estated in it before. Powell, J., relied upon the case in Moore 31. in which, "I have made a lease to J. S. at 10s. rent" was held to be a good devise, but the other judges considered the case to be of little authority. See 18 Ves. 27; 2 T. R. 209; 2 P. Wins. 533; 2 Ves. jun. 351. [162]

2dly. With reference to the description of the devisees.

1. In general.

BATE v. AMHERST. M. T. 1663. K. B. T. Raym. 82. S. P. **DOE, D. LE CHEVALIER, v. HUTHWAITE.** T. T. 1820. K. B. 3 B. & A 637; S. C. 2 Moore, 304. S. P. **DOE, D. CALKIN, v. TOMKINSON.** M. T. 1813. K. B. 2 M. & S. 165.* S. P. **DENN, D. BALDERSTON, v. BALDERSTON.** Cowp. 257. S. P. **STRODE v. PERRYOR.** 1 Mod. 267; S. C. 2 Jon. 135; S. C. 2 Show. 63; S. C. 3 K. B. 845. S. P. **SMITH v. PAYNTON.** East, 87. S. P. **FEN, D. LOUNDES, v. LOUNDES.** 4 Burr. 2246. S. P. **ANON.** 3 Mod. 217. Any words that are sufficient to denote the persons meant by the testator, and to distinguish them from all others, operate as a good description. S. P. **LANE v. VANE.** T. Jon. 98. S. P. **HILLIARD v. JENNINGS.** 2 Mod. 278; S. C. Com. 90; S. C. Carth. 514. S. P. **SCATTERWOOD v. EDGE.** Salk. 229. S. P. **NURSE v. YEARWORTH.** 2 Mod. 9. S. P. **JONES v. FULHAM.** Andr. 263. S. P. **REVE v. LONG.** 4 Mod. 282.

A person devised all his land in Kent and Sussex to one of his cousin Nicholas Amherst's daughters, that should marry a Norton, within fifteen years; N. Amherst had three daughters, one of whom married with a Norton within fifteen years. This was adjudged a good devise to her, notwithstanding the uncertainty; and that the law would supply the words, shall first marry. See 1 Sim. & S. 78.

2. As to particular expressions.

(a) Children.†

(a 1) What class of objects the term comprehends.

(a 2). In general.

DOE, D. WILLIAMS, v. HALLETT. H. T. 1813. K. B. 1 M. & S. 124. S. P. **WHITE v. BARBER.** 5 Burr. 2703.

This was a devise to the use of A. only surviving son of J. S. for life, to his first and other sons, &c.; and, for default of such issue, to the use of the first, second, and of all and every other son and sons of J. S. lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said A., and his first and other sons, and also the first and other sons hereafter to be born of the said J. S., should reside at the family house, &c. The question was, whether the second son of J. S. born before the date of the will, should take upon the death of A. without issue. A devise to children to be born and begotten, is not confined to future children.

Per Cur. Such son was certainly entitled to take under the will. When the will was made, the testator was not aware of any other son than A., because he expresses that he is the only son; and when a testator uses the words [163]

will accordingly supply it; Ambl. 661. But where a testator in a codicil referred to a devisee of his will, as taking a different property from that which he had actually given her, it was treated as an erroneous reference, and not as constituting a new devise, in opposition to the will, giving that property to another person; 7 T. R. 492.

Words of advice, recommendation, or desire, do not create a devise; nor will they even operate so as to raise a trust in equity, unless the property is certain, and the persons to whom it is given clearly described; and even in that case such words are not in general deemed imperative or legatory, where they are inconsistent with the antecedent right or interest devised to that person to whom they are addressed; 8 Vin. Abr. 289; Prec. in Ch. 201. n; 1 B. & P. 142. Notwithstanding the authority of these determinations, there are some cases in which words of desire and request have been held to be imperative and legatory; but that was only where the property was certain, and the objects of the testator's bounty clearly pointed out; Ambl. 520; 1 Bro. P. C. 476; 17 Ves. 255; 19 id. 299.

The Courts have, however, allowed of a devise by implication, where it has been very apparent; Willes' Rep. 14 n; 1 Ves. & Bea. 466.

* In this case it was held, that a contingency coupled with such an interest as is descendible is devisable, but not if it be descendible; that is, if there be no person to take in certain.

† The legal construction of the word children accords with its popular signification; for, in all the cases in which it has been extended to a wider range of objects, it has been used synonymously with a word of larger import, such as issue; 1 Ves. sen. 196; Ambl. 681.

"to be begotten," not being aware of any other issue, the rule is, that those words shall include children then born; and if it were not so, it would militate in every case against the intention of the testator. The limitation is made to the children in respect of the stock, and not of personal affection to them; but, if the words, "to be begotten," were held to exclude children then born, it would exclude a child born a few days before at a distant place. That affords a good reason, therefore, for considering the words "to be begotten" as of the same import as begotten; because otherwise great injustice might arise; and as the word "begotten" does not exclude children after born, so neither do "to be begotten" exclude children then born, being merely words to denote the children of the stock.

(b 2) *When there is a specified number.*

DOE, D. STEWART, v. SHEFFIELD. E. T. 1811. K. B. 13 East, 526.

If a testator give to his children generally; or to the sister of A., as a class; the objects composing the class at his death, whatever be their number, and when ever born, are entitled.

A testator devised land to the sisters of J. H., (generally) their heirs, &c. as tenants in common, and not as joint tenants. There had been three sisters of J. H. One of the sisters, who alone survived at the time of the devise made, and who also survived the testator, claimed the whole. It was urged, that by directing the sisters to take as tenants in common, and not as joint tenants, the testator manifestly intended that the three who were once living, should take several estates or shares, which were not to go over from the one to the other. *Sed per Cur.* If, indeed, the property had been left to them by name, as tenants in common, no doubt, if one of them had died before the testator, her share would have gone over; but where it is left to persons generally, under the class and description of sisters' children or the like, and there may be additional sisters' children, &c., after the will is made, then, whoever answers the description at the death of the testator, will take under such a devise. The claimant is, therefore, entitled to the whole property devised.

See 2 Vern. 105, 545, 705; Moore, 220; 9 Mod. 104; 1 Ves. 114; Cowp. 309; 2 P. Wms. 489; 3 B. & P. 16; 2 Bro. Ch. Rep. 85, 658; 1 Bro. Ch. Rep. 31. Ambl. 273.

(b 2) *As to limitations over.*

WEAKLEY v. RUGG. T. T. 1797. K. B. 7 T. R. 322.

Where a leasehold property was bequeathed to A., and, in case she died without having children, over; it was held [164] that the legatee's interest became indefeasible on the birth of a child.

The testator, after giving small legacies to his two other daughters, devised a leasehold estate to his daughter A.; but if she should happen to die, without having child or children lawfully begotten, then to his daughter M.; and after her, to such child or children as he should happen to have. A. had three children, who all died in her life time. The question was, whether A. took the whole interest in the term?

The Court held, that A. took the absolute interest, although she had no child living at her death; for, although such a devise does not raise an implied gift in the children, yet the parent takes no absolute interest; here A. was the favourite daughter; had she died leaving children, the property was not limited to them, but would have remained at her disposal; but the next limitation manifested a difference by tying it up to M. and her children. Were the will construed otherwise, a grandchild of A. by a child who had died in her life-time, could not have taken. And Lawrence, C. J., admitted that, although, according to the grammatical construction, the estate would go over, since "having" referred to the time of the death; whereas, to vest it absolutely in A. the word must be "having had;" yet that the argument was overcome by the general intention of the testator.

(b) *Descendants.**

LEGARD v. HAWORTH. M. T. 1800. K. B. 1 East, 120.

Where property was devised to A. and B. in fee, and, in case of death, to their children and grandchildren respectively, or to

A. devised a reversionary estate to A. B. and C. D. as tenants in common in fee, and in case both or either of them should happen to die in the life-time of E. F. who had an estate for life in the premises, then the share or shares of her or them so dying to go "unto all and every such child or children, grand-

* A testator devised his estate to three persons for life, and, after their death, to the descendants of Francis Ince, then living in and about Seven Oaks, in Kents. Sir T. Clarke, M. B., said, that a devise to descendants at large has been good: here the deviser added a

child and grandchildren of the said A. B. and C. D. respectively, as should be their issue then living at the time of her or their decease; and to the issue of such of them and respect as should be then dead and have left issue; and to his, her, and their respective heirs, as tenants in common; yet, nevertheless, so as all the descendants of the said A. B. should together be entitled only to one moiety of the said premises, yet, nevertheless, so as all the descendants of the said C. D. should together be entitled to no more than the other moiety thereof; and that none of such descendants as all the descendants of either of A. B. or C. D. should be entitled to any greater or other share of the said respective moieties of the said respective premises, than his, her, or their father or mother would have been entitled to if living." The question was, should to whether the word *descendants* was meant to include the children and grandchildren together be children named in the will, or whether they were intended to take *per capita*, entitled on It was urged that the intent was that the descendants of the two principal devisees, at least as far as grandchildren, who were living at the decease of either of them, should take *per capita* in equal shares. It was allowed that a moiety of the said premises, and doubt might arise upon the words "that none of such descendants of A. B. all the descendants of and C. D. respectively should be entitled to any greater or other share than his or their parent would have been entitled to if living." To explain this B. should away, it was contended, that the word *descendants* must mean descendants *ultra* together be the grandchildren, who together with children were before specifically named; and in this sense such descendants must take *per stirpes*. And, lastly, in aid of this construction, it was maintained, that it was probable that the grandchildren being *in esse* at the time, were as much the object of the devisor's bounty as the children or their parents, all being specifically mentioned. [165]

Per Cur. According to the fair interpretation of the words of this will, no other case can be put where the parent and children were to take together. No other construction than this is consistent with the words of the will; for the descendants of the two principal devisees are to take in such manner, so as the descendants of A. B. should together be entitled only to one moiety; and all the descendants of C. D. should together be entitled to no more than the other moiety. And this is further confirmed by the words which follow: "and that none of such descendants should be entitled to any greater or other share of the said respective moieties than his or their father and mother would have been entitled to if living." Now, if the parents were living, it is clear that the child could not take any share; because if he took any, it must necessarily be other share than the parents would otherwise have taken, as it would be a divided share. See 2 Ves. jun. 357. 366; 6 Co. 17; 1 Vent. 231; 1 Rol. Rep. 319. than the other moiety thereof, none of such descendants, either of A. or B. should be entitled to any greater or other share of the said respective moieties of the said respective

premises, than their parents would have been entitled to, if living; it was holden, that the word *descendants* included the children and grandchildren, and that they took *per stirpes*, and not *per capita*.*

(c) *Heir.*

1. GOODRIGHT, D. BROOKING, v. WHITE. E. T. 1775. C. P. 2 Bl. Rep. 1010.

A. B. devised to C. D., his heirs male, and to the heirs of his daughter E. F., jointly and equally to hold to the heirs male of C. D., lawfully begotten, and to the heirs of E. F., jointly and equally, and their heirs and assigns for ever. It was resolved, that this was a sufficient designation of the person, to make the son of E. F. take as her heir, living the mother. See 5 B. & C. 48. A devise may be described by the word *heir*;

2. BURCHETT v. DURDANT. T. T. 1690. C. 2 Vent. 311. S. P. DARBISON v. BEAUMONT. 1 P. Wm. 229; S. C. 3 Bro. P. C. 60. S. P. DOE, D. HALLEN, v. IRONMONGER. E. T. 1803. K. B. 3 East, 533. S. P.

description of such as he intended should take, which was sufficiently precise and certain; it would be unjust to confine it to the heir at law, because the word *descendants* meant all those who proceeded from his body, and, therefore, the grandchildren of Francis Ince were entitled: but, a great grandchild, being born after the will made, was excluded by the words then living.

* In *Butler v. Stratton*, 3 B. C. C. 367, under a devise to descendants, children and grandchildren were held to take *per capita*; but see *Rowland v. Gorsuch*, 2 Cox, 187.

JAMES V. RICHARDSON. Sir T. Jones, 99; S. C. 1 Vent. 334. S. P. BAKER V. WALL. 1 Ld. Raym. 185. S. P. FORD V. OSSULSTON. M. T. 1708. K. B. 11 Mod. 189. S. P. TILLEY V. COLLYER. 3 Keb. 589. S. P. GOODRIGHT, D. HOOGE, V. SALES. 2 Wils. 329. S. P. SMITH V. TRIGG, 1 Str. 491. S. P. DUTTON V. POOLE. 2 Lev. 211; S. C. 1 Vent. 317. S. P. PLUNKET V. HOLMES. T. Raymond. 28.

If the testator plainly show, that the term was meant by him, to be under stood as a *descriptio personæ*.

[166]

But if one claim under the descrip tion of heir, he must show that he is heir in that sense which the testator has used the term.

A. B. devised to a trustee and his heirs, in trust to permit C. D. to receive the rents during his life, and, after his decease, to the heirs male of the body of the said C. D., then living. It was adjudged that this was a vested remainder in the only son of C. D.; the words heirs male of the body then living being sufficient designation of such only son, as much as if it had been to his heir apparent.

3. COLLINGWOOD V. PAYS. E. T. 1764. 1 Sid. 193; S. C. 1 Lev. 59.

A. B. seised of lands in fee, by devise "gave unto the heir of his brother N. and to his heirs for ever, all those his manors of M. and T., upon condition to pay debts, &c." N., the brother, was an alien. One question was, whether this was a good devise? *Per totam Curiam*. The devise was void; because there can be no devise, if it be not known whom the deviser intends; then when he said "the heir of my brother N.," N., being then an alien, there was no such person as his heir; for, though every alien might have sons, no alien could have an heir; for, *filius est nomen naturæ, sed hæres nomen juris*.*

4. HENY V. PURCEL. E. T. 1775. C. P. 2 Bl. Rep. 1002. S. P. BAKER V. WALL. E. T. 1697. K. B. 1 Ld. Raym. 185. S. P. DARBISON, D. LONG, V. BEAUMONT. 1 P. Wms. 229. S. P. GOODRIGHT, D. BROOKING, V. WHITE. 2 Bl. Rep. 1010. S. P. WILLIS V. PALMER. 5 Burr. 2617.

These rules are, it will be noticed founded on the evidence afforded of the testator's intention.

E. devised lands to trustees, amongst other things, to pay the rents to R. his wife, for her separate use during her natural life; and, after her decease, to the use and behoof of the heirs of the body of the said R. lawfully issuing; the elder of such issue, and his, her, and their heirs to inherit and take place before the younger of such issue, his, her, and their heirs; with remainders over. The testator left R., his wife surviving (who died soon after), and R. B. and M. his daughters, and no other issue. R. B. entered on the residue, and died, leaving two daughters, A. and J., and no other issue. The question was, whether J. took any, and what estate in the lands devised. De Grey, C. J., observed, that there was no doubt of the testator's intention that the elder daughter should inherit before the younger; but how to effect that intention consistently with the rules of law was the difficulty. It had been held, that the heir who takes by purchase may be a qualified heir, and not heir general; then could not one of two sisters be considered as a qualified heir? The Court ultimately certified that A. took in the first place an estate tail in the whole of the lands, and that J. likewise took an estate tail in remainder, expectant on the determination of the said precedent estate tail in the whole, with remainder over.

[167]

(d) Issue.† (e) Kindred.‡ (f) Next of Kin.

DOE, D. GARNER V. LAWSON. H. T. 1803. K. B. 3 East, 278.

A devisee may be described as next of kin; (Cro. Eliz. 522.)

Where a testator devises certain limited interests, and then bequeaths the

A. B. devised to his natural son; and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life; and after his decease, then for and amongst such person and persons, his and their heirs, &c. as should appear and could be proved to be his next of kin, in such pro-

* So, where A. devised that the heir of B. should sell his land, and B. was attainted of felony in the life-time of A., and then A. died, the eldest son of B. could not sell the land, for he was not heir, because the blood was corrupted; Jenk. Cent. 203.

† The word "issue" is a sufficient designation personæ, or description of a devisee in a will, and comprises both children and grandchildren; 2 Vern. 545; 1 Ld. Raym. 205.

‡ A. B. devised his estates to his sister, C. D., in strict settlement; remainder "unto the first and nearest of his kindred, being male, and of his name and blood, that should be living, at the determination of the several estates therein-before devised, and to the heirs of his body lawfully begotten." Lord Eldon held, in conformity to the opinions of Mr. Justice Lawrence and Mr. Baron Thompson, whom he had called to his assistance, that a person claiming under this limitation must be of the name as well as the blood; and that the qualification as to the name was not satisfied by having the name taken by the King's licence, previous to the determination of the preceding estates; 15 Ves. 92.

portions, as they would, by virtue of the statute of distributions, have been entitled to his personal estate, if he had died intestate. The question now before the Court was, whether by the words, "next of kin," &c., the testator meant such as should answer that description when the limitation over was to take effect, or whether the testator meant such as should be his next of kin at the time of his death. *Per Cur.* The persons to whom the remainder over is limited are to take in such proportions as they would, by virtue of the statute of distributions, have been entitled to, if he had died intestate. That therefore must refer to persons who were his next of kin at the time of his death.

See 3 Bro. Ch. Ca. 64; 14 Ves. 385; 1 Cox. 236; 3 Meriv 689.

(g) Next of testator's name.* (h) Posterity.† (i) Relations.

DOE, D. THWAITES, v. CARR E. T. 1808. C. P. 1 Taunt. 263.

A testator devised all his freehold estates to his wife for life, and at her decease, to be equally divided among his relations on his side. It was held, that the three first cousins of the testator, who were his next of kin at his death, were entitled in opposition to the claim of the heir at law (who was the child of a first cousin, that died between the making of the will and the death;) contending that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words "on my side;" but the Court was of opinion that those words did not exclude the maternal relations, they being as nearly related to the divisor as the relations *ex parte paterna*.

(k) Sons.‡

(l) Stock, family,|| or house.

DOE, D. CHATTAWAY, v. SMITH. E. T. 1816. K. B. 5 M. & S. 126.

Per Cur. A devisee may be constituted by a devise to a stock, or family, or house, and it shall be understood of the principal heir of the house; for it being doubtful what is the precise meaning of the testator, as to which of the stock, family, or house, should be included as devisees, the law shall prevail, which always favours the heir.

* A devisee may be described as the next of the name of the testator; and the next relation of his name, whether it be male or female, shall take as devisee described thereby; Cro. Eliz. 532.

† If lands be devised to the posterity of A. the lineal heir, if there be any, shall take them under the word posterity; but, if A. die without issue, and there be no lineal heir of A., the collateral heir of the whole blood shall take them; 2 Eq. Ca. Abr. 290. 297.

‡ The construction of the word relation is not varied by the word near being associated with it; 2 Ves. sen. 527. But, where the gift is to the nearest relations, the next of kin will take, to the exclusion of those who would have been entitled by representation under the statute; 1 Ves. sen. 335; 1 Bro. Cha. C. 293; 19 Ves. 400; Amb. 70.

A difficulty in construing the word "relations" sometimes arises from the fact of the testator having superadded to their qualification, an ingredient of an indefinite character; as, where he gives to the most deserving of his relations, or to his poor or necessitous relations. In the former case, the addition is disregarded; Doyley v. Attorney-General, 4 Vin. Abr. 435. pl. 16; S. C. 2 Eq. Ct. Ab. 194. c. 15; and the better opinion upon the authorities is, that the word "poor" is also inoperative to vary the construction, though the cases are somewhat conflicting; Widmore v. Woodroffe, Amb. 636; Anon. 1 P. Wms. 376.

It may be here observed, that where a testator, who was a surgeon in the 94th regiment, in India, devised to his relations "in his native country, Ireland," it was held that these words were not words of restriction, demonstrating the place in which relations were to reside, who should be entitled; but merely a superadded description of the place, where he thought his relations were living. The place of residence, therefore, of any of them, was immaterial; 2 Powell by Jarman, 293.

§ Lands were devised to the first son of A., who was not heir at law to A. his father. This was held a good description of the second son. Marwood v. Darrell, Ca. Temp. Hard. 91.

A person devised to his son C. for life, and after his decease, to the first second, third, &c. sons of his body begotten. C. married about two months before the date of the will; he had a son who died soon, and afterwards another son. Lord Hardwicke decreed that the second son should take under the will; as first son; for these words were not to be always taken strictly in the sense of primogenitus, or first-born; but in the sense of an elder son, senior, or maximus natus; 1 Ves 290.

|| The word family has been sometimes construed as descriptive of children; as where a testator devised the remainder of his estate to be equally divided between brother L.'s and sister E.'s families; it was held by Sir W. Grant, M. R., that the children of L. and E. took as

property to his own next of kin, those who stand in that relation at the death of the testator, will be entitled without regard to the fact of their existence, at the period of distribution.

Under a devise to the relations on testator's side, all those shall take who would be entitled to personal estate under the statute of distributions.‡

The words "Stock; family; &c;" are sufficient words of description.

3. *As to where a devise is rightly described, but misnamed.*1. *WOODRIGHT v. WRIGHT*. H. T. 1718. K. B. 10 Mod. 371.

Where a devise is [169] rightly described, but misnamed, the devise will be hold en good; A. B. devised land to the wife of J. S.; J. S. died, and she took to husband J. D., and then the devisor died. The Court held, that she should take the land; for, although she was not the wife of J. S. when the devisor died, nor should she take it as his wife, yet the intent was, that she who was the wife of J. S. at the time of the making of the will should have it, and the person was clear by the description. See 1 Vin. Abr. tit. Devise, T. b. pl. 2; Plowd. 344; Finch Ch. Rep. 403; 1 Atk. 410; Godb. 17.

2. *DOE, D. COOK, v. DANVERS*. H. T. 1806. K. B. 7 East, 299; S. C. 3 Smith's Rep. 291.

If sufficient appear to identify the party.* A devise had been made to one by the name of Mary. Her real Christian name was Elizabeth. At the trial, the jury found, from the circumstances, that she was the person meant to be designated. The Court now, when this objection (*inter alia*) was brought before them, ordered the *postea* to be delivered to the plaintiff.

4. *As to where a person is properly named, but misdescribed.*

DOE, D. LE CHEVALIER, v. HUTHWAITE. T. T. 1820. K. B. 3 B. & A. 632; affirming S. C. 2 Moore, 358; and 8 Taunt 459.

So, a wrong description will not vitiate a devise, to a person, properly designated.† [170] This was a case of a devise to H. D. for life, with remainder to the first son of C. D. in tail male; and in default of issue, to his second son in tail male; and in default of his issue, to the third, fourth, fifth, and sixth sons in tail male severally and successively, in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth, the several and respective heirs male of all and every son, every elder of such sons and his heirs male, being preferred to and take before the younger; and in default of such issue, then to the first, second, third, fourth, and all, &c. the daughters of C. D. and their issue, severally and successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to and take before the younger; and in default of any such issue, then to G. H., well the real as personal estate, per capita; *Barnes v. Patch*, 8 Ves. 604; see also *M'Le Roth v. Bicon*, 5 Ves. 159; and *Doe, d. Chattaway, v. Smith*, 5 M. & S. 126.

The word family has also been treated as synonymous with relations. Thus, where a testatrix, after bequeathing her property to her sister for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeath "at her own death to those of her own family, what she has in her own power to dispose of that was mine." Sir W. Grant, M. R. held, that the expression "of her own family" was equivalent to that of her own kindred, or of her own relations; and she not having exercised the power, it was therefore a trust for her next of kin; *Crawys v. Coleman*, 9 Ves. 319. Every case, however, must depend upon its particular circumstances.

* If, therefore, a devise be to William, Earl of Pembroke, or William, Bishop of Salisbury, and his name be John, the devise is good, there being a sufficient certainty, without the Christian name. for there can be but one person, Earl of Pembroke, or Bishop of Salisbury. wherefore, the mistaken Christian name will be rejected as surplage, and the devise take, as described by his name, of dignity, or description of his office; Co. Litt. 3. a. But if the description be false, and not merely imperfect, the devise will be void. As if one had devised lands to the Abbott of St. Peter, where the foundation was at St. Paul. there the devise had been void; Hob, 33; Bro. Dev. 2. So, if one devise his lands unto the heir of his brother, and to his heirs for ever, and his brother, at the time of the devise, be an alien, not naturalized, the devise will be void; vide *Collingwood, v. Pays*, 1 Sid. 193; the reason of which is, that the devise was falsely, not imperfectly, described; for no alien can have an heir: but if in such case, he, who claims under the devise, be proved to be the reputed heir of the brother, then, although the father were an alien, the son might take the devise; per Glyn. C. J. 2 Sid. 151.

† But in *Andrews v. Dobson*, 1 Cox, 425. the bequest was made to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person of the name of Thomas Andrews, in Eastcheap, but there was James Andrews, a printer, who lived there; he had one son named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The son by the first wife claimed the legacy, insisting that the testator meant "Thomas the son of James, instead of James, the son of Thomas," and prayed some inquiry respecting these circumstances. But Sir Lloyd Kenyon, M. R., said that, though there were cases, in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet he thought this was beyond all precedent, and dismissed the bill.

the eldest son of T. H., of Nottingham, for life, with the limitation of his first and other sons and daughters as in the preceding, and in default of such issue, to J. H., the third son of T. H., of Nottingham, for life, with remainder to his children, as in the preceding limitations. S. H. was in fact the third, and J. H. the second son of T. H., of Nottingham; and the question was, which of them was intended. The Court of Common Pleas held that it came within the rule, *veritas nominis tollit errorem descriptionis*, and therefore that S. H. was the person entitled on the face of the will. It had been insisted in argument that the testator evidently intended, from the general plan of the will, that the estate should go to the son according to seniority; but the Court considered this as merely conjecture. On the case being brought into the Court of K. B., it was held that parol evidence was admissible to ascertain whether the error was in the name or description; and the Court awarded a *renew de novo*.

3dly. With reference to the property conveyed.

1. As to what expressions will carry the realty.

(a) General rule.

1. *DOE, D. BUNNY, v. ROUT.* T. T. 1816. C. P. 7 Taunt. 79. S. P. FISHER v. NICHOLLS. H. T. 1700. K. B. 3 Salk. 99.

The question was, whether land passed under the following clause: "I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and, subject thereto, I give and bequeath unto my sister A. R., all my stock in trade, household goods, lands, wearing apparel, ready money, securities for money, and every other thing my property, of what nature or kind soever, to and for her own proper use and disposal;" and he appointed her executrix. The Court of Common Pleas held that, an intention to pass land could not be clearly collected from these words, and said: on the words of the devise itself, seeing that in all the introductory words used, the testatrix enumerated every article of personal property which she can recollect, without saying any thing touching land, and seems to add these words at last, merely lest she should have omitted something, we cannot but think, that if she had had it in her intention to dispose of her land, she would have used more particular expressions; at all events, we cannot collect from the will a clear intent to dispose of her land. We, therefore, think the title of the heir at law, must prevail, and that the defendant is entitled to judgment.

2. *BEEB v. PENOYRE.* E. T. 1809. K. B. 11 East, 160.

A testator, after various devises and bequests, by the residuary clause, ordered the lease of his houses, with his furniture, to be sold, and all the rest and residue to be divided amongst other friends, and appointed executors. It was contended that the reversion in fee, of a moiety of certain houses, devised by the will for the life of the devisee, passed by the word "rest and residue." The Court were of opinion, that the words *rest and residue*, in the place in which they stood in the will, and so accompanied, meant property of a similar nature to the lease of the house and furniture before mentioned; viz. his personal estate; and certified to the Master of the Rolls accordingly. See 8 Ves. 604; Gilb. Eq. Ca. 33; 9 Ves. 137; 2 Atk. 102.

(b) Particular expressions.

1. *ROE, D. HELLING, v. YEUD.* T. T. 1806. C. P. 2 N. R. 214.

Testator, after directing his debts and funeral expences to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, all the remainder of his property, whatsoever and wheresoever, to be divided equally, share and share alike; after their paying and discharging the before mentioned annuities, legacies and demands, or any he might thereafter make by codicil to his will; all his goods, stocks, bills, bonds, book debts, and securities, in the Witham drainage, Lincolnshire, and funded property. The question was, whether testator's real estate passed under the residuary clause. The Court held, that it did not, considering that the enumeration at the end of the clause was explanatory of the words "remainder of my property." See Prec. in Ch. 471; 1 Atk. 102;

1 Eq. Ca. Abr. 211; Willes 141; Vaugh 262; 1 Rol. Abr. 834; Pl. 14; Cro. Car. 447. 449; 2 Ves. 51; 3 East, 553; 1 H. Bl. 223; 9 Ves. jun. 127; Com. Dig. tit. Devise, N. 2; 1 Bro. Ch. R. 437.

2. SCOTT v. ALBERRY. E. T. 1721. C. P. 1 Com. 337.

But to war-
rant such a
construction
of
words oth-
erwise ap-
plicable to
realty, as to
confine
them to per-
sonalty,
there must
be a clear
indication
of such an
intention.
[172]

In this case, the testator "as touching the wordly estate it had pleased God to bestow" upon him, devised in these words: "I give to my cousin, J. S. all that my parcel of land lying in W. A. Then I give to my said cousin, J. S. my wearing apparell, linen, books, with all other my estate whatsoever and wheresoever not hereinbefore given and bequeathed; and him the said J. S. I make the sole executor of this my will for performing the same." The question was, whether the reversion in fee in the lands in W. A. before devised to J. S., which were copyhold, surrendered to the use of testator's will, passed under the latter devise, and it was held that it did. See Tilley and Simpson, 2 T. R. 659. n; * 1 Cox, 362.

3. SOUTH v. ALLEN. T. T. 1695. K. B. Comb. 375; S. C. 1 Salk. 228; 9 C. 5 Mod. 102. S. P. MAUNDY v. MAUNDY. T. T. 1736. K. B. 2 Stra. 1020. S. P. BUSH v. ALLEN. 5 Mod. 63. S. C. 1 Salk. 228; S. C. Comb. S. P. 375. COURTHORPE v. HEYMAN. T. T. 1665. C. P. Carl. 25. S. P. ROPER v. RATCLIFFE. 10 Mod. 94.

For even
the words
rents and
profits have
carried;
land.

Per Cur. The words rents and profits, all my rents, and such like, are, where the intention is apparent, sufficient to pass real property.† See 1 Jac. 468.

4. HOGAN v. JACKSON. T. T. 1775. K. B. Cowp. 299; S. C. 3 Bro. P. C. Tomlin's Ed. 388.

The words
"residue of
effects real
and person-
al," follow-
ing an ex-
press devise
of lands,
was holden
to include
the real es-
tate.

A testator, after commencing his will with the words, "as to my worldly substance," devised certain lands to his mother, M. J. for life, and after giving certain legacies to be raised out of those lands, concluded as follows; "I give and bequeath unto my mother, M. J. all the remainder and residue of all the effects, both real and personal, which I shall die possessed of." It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects," and "possessed," were applicable, rather to personal, than real, property; but, the Court held, that the clause amounted to a disposition of the whole of the testator's real and personal estate.

5. GRAYSON v. ATKINSON. M. T. 1752. C. 1 Wils. 333. S. P. CAMFIELD v. GILBERT. E. T. 1803. K. B. 3 East, 516.

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A person begun his will thus: "As to all my temporal estate, wherewith it hath pleased God to bless me, I give and devise the same as follows." Then he gave several legacies to A., and directed him to sell all, or any part of his real and personal estate, for the payment of his debts and legacies, and concluded his will with this residuary devise: "As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, te-

* In this case, a testator, after declaring his intention to dispose of all his wordly estate; and making several devises to different persons, devised all the rest and residue of his money, goods, chattels, and estate, whatsoever. Lord Hardwicke held that the fee passed; he said, where the Court had restrained the word "estate" to personal estate only, it had been when the intention of the testator that it should be so used had appeared, or when it stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods, and estate, to which the preceding words were not a full description of the personal estate; that if the testator had said "all the rest and residue of my personal estate and estates whatsoever," a real estate would have passed; that this bequest amounted to the same, for the word, *chattels*, is as full a description of the personal estate as the words personal estate; that therefore, when he had used words comprehending all his personal estate, and then made use of the word "estate," that word would carry a real estate. That the word "whatsoever" was used here, which was the same as if he had said, of whatever kind it be; and if that had been the case, it would most certainly have carried the real estate. His lordship observed, that the case of Terrell and Page, 1 Ch. Ca? 262; S. C. 1 Eq. Ca. Abr. 209. c. 11, was very material to the present question, and he thought could not be distinguished: the only difference was, in that case, there was the word "other," which he did not think could distinguish it. If the devise had been, and all the rest and residue of my household goods, mortgages, and all other estate, he did not think the words would have extended to the testator's real estate.

* So the words "all I am worth;" 1 Bro. R. 437.

nements, my share in the copper works, &c., I give to the said A.," without using the word estate, or any words of limitation whatever. Lord Hardwicke doubted at first; but was afterwards clearly of opinion, as the testator had a fee, that A. took a fee. [173]

5. FLETCHER v. SMITON. M. T. 1788. K. B. 2 T. R. 656; S. C. 2 Chit. Rep. 558. S. P. BRIDGWATER v. BOLTON. 1 Salk. 236; S. C. 6 Mod. 108. S. P. ROE, D. URRY, v. HARVEY. 5 Burr. 2638. S. P. ROE, D. PVE, v. BIRD. 2 Bl. Rep. 1301 S. P. ANON. Skin. 194.

A testator seised in fee of four shares in buildings, called the Corn Market, and of other freehold estates, after directing all his debts to be paid, and bequeathing some legacies, devised as follows: "I give to my wife the profits of my four shares in the Corn Market during her life, and my lands lying," &c. and "after her decease I give to M. W. the income of my four estates in the Corn Market for his natural life, and all the rest of my estates, with all monies, &c. to be divided in equal shares to A., B., C., D., and E., share and share alike." The question was, whether the last clause comprehended the reversion of the shares in the Corn Market, and carried the absolute inheritance in them to the residuary devisees?

Per Cur. The word, *estates*, is equivalent to *estate*, to pass a fee, unless words be added to express a different intention. It has been admitted that if the word *estate* had been used, it would have passed the reversion; that the testator's first object was that all his debts should be paid, which intention might be defeated unless the will were to operate on the whole inheritance; for the debts could not perhaps be paid out of the particular estates carved out of it; and we are also of opinion, that the reversion in fee of the shares passed by the residuary clause. See 6 Madd. 270.

6. SMITH v. COFFIN. E. T. 1795. C. P. 2 H. Bl. 444; abridged more fully *anle*, vol iii. p. 684.

The testator devised, "all the rest and residue of my goods, chattels, rights, credits, personal estate, and *testamentary estate*, whatsoever, and in whose hands soever, not hereinbefore particularly given and bequeathed, I hereby give and bequeath unto my said wife, for her own use, benefit, and disposal."

The Court held that the real estate of the testator, not specifically devised, passed by the words *testamentary estate*; because, if the words had not this application, they would be mere tautology, as the personal estate had been given before.

7. DOE, D. PENWARDEN, v. GILBERT. M. T. 1821. C. P. 3 B. & B. 85; S. C. 6 Moore, 268.

An action of ejectment, disclosed, that testatrix, as for her temporal estates and effects, gave and disposed of the same in the manner following: viz. she bequeathed to L. C. 4l. and to H. H. 3l. which legacies she directed to be paid by her executor within three months after her decease; also she gave, devised, and bequeathed to J. G. all her lands, tenements, and hereditaments, particularly those called B. and C., situate in P., which were lately the land of her husband; and all the rest and residue of her goods and chattels, personal and testamentary estate and effects whatsoever, she gave and bequeathed to the said J. G., whom she appointed sole executor of her will. On the question what estate J. G. took; the Court held, that J. G. took a fee in the lands of B. and C., it being the intention of the testatrix, as collected from the will, to dispose of all her property, and that the words "*testamentary estate*" in the residuary clause, connected with those of "*personal estates*" in the introductory clause, were sufficient to convey such an estate, although the clause devising the lands would give him an estate for life only.

8. DOE, D. ANDREW, v. LAINCHEBURY. T. T. 1839. K. B. 11 East, 290.

A testator began his will thus: "As to the little money and effects, &c., I dispose thereof as follows, that is to say," and then he first ordered his chambers in Gray's Inn to be sold. He next proceeded to devise lands, &c. freehold and copyhold. He afterwards directed money to be laid out in the purchase of land, to be added to his other adjoining property. Then followed the

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the testator
had applied
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and effects,
to real es-
tate.

In most of
the cases
hitherto
mentioned,
there has
[175]
been a spe-
cific devise
of land: but
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residuary clause, by which he disposed of the rest of his "money, stock, property, and effects, of what nature or kind soever," &c. It was contended that such last clause did not include real estates.

Sed per Cur. An heir is not to be disinherited but by express words, or necessary implications. And here we think the latter prevails; for although the word *effects*, in its natural and usual sense, would not apply to real property, it appears to us that the testator, in the case before us, meant that it should; for after using the terms "he devises his chambers," which is at least a chattel real, he besides directs money to be laid out in the purchase of land "to be added to his other adjoining property," which gives a standard of his meaning of the word *property*, and shows that he meant by it real estate. We cannot, therefore, look for a different means made by other persons on other occasions, when we have an index of the testator's own mind to resort to in the very instrument before us, where he has told us that by those words he meant real estate. See 6 T. R. 610; 3 East, 516; Cowp. 304; 1 Bro. Ch. Ca. 437; 1 East, 33; 7 Bro. P. C. 467.

9. DOE, D. WALL, v. LANGLANDS. T. T. 1811. K. B. 14 East, 370.

A testator, after giving several pecuniary legacies, bequeathed as follows: "To R. D. and E. W. I give and bequeath *the residue of my property, goods, and chattels*, to be divided equally between them, share and share alike." It was contended, that the word "property" was restrained by the subsequent words, the clause being read, viz. "my goods and chattels."

Sed per Cur. We do not feel ourselves warranted in so reading them. The most obvious and natural sense is, that they are to be taken *cumulative*, that is, as property, and goods, and chattels. The real estate consequently passed under the will. See 2 P. Wms. 523. 525; Ambl. 181; 2 Bl. Rep. 938; 1 T. R. 411; 2 T. R. 656; 1 H. Bl. 223; 4 T. R. 89; 7 East, 259; 8 Ves. jun. 604; 11 East, 290. 292. 518; 2 N. R. 214; 2 Ld. Raym. 1326; 2 Atk. 102; 2 Ves. 51; 3 East, 516.

of real estate under such like terms, though collocated with words descriptive of personal property only.*

10. SHAW v. BULL. M. T. 1701. C. P. 12 Mod. 592.

A. B. seised in fee of five messuages, by will devised, two to his wife for life; remainder to his two daughters in fee; the third to his wife and her heirs; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all; and if she did not make provision for the payment of his legacies in her life time, that it should be lawful for the legatee after her death to sell the said messuages, to satisfy the legacies, out of the value thereof. Then follows this clause on which the question as to whether the real estate passed, arose, "And all the overplus of my estate to be at my wife's disposal, and make her my executrix."

Blinco, J., said, if he had at first devised to his wife all his estate, this (the fifth) house would have passed to her; but compare this clause to the subsequent words "and I make her my executrix," it shows that his intent was to grant her such estate as she was capable of, as executrix. He considered "overplus" to refer to the price of the house after payment of legacies. fairly bore such a construction. But in this case such association has been considered restrictive.

11. DOE, D. HURRELL, v. HURRELL. M. T. 1822. K. B. 5 B. & A. 18. S. P.

DOE, D. SPRING v. BUCKNER. E. T. 1796. K. B. 6 T. R. 610.

A testator, having both real and personal estates, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust that they should out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession, for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named, and at the expira-

* So, in the case of Doe, d. Gillard, 5 B. & A. 785, real estate was held to pass under the words "I do make, constitute, and appoint R. G. my whole and sole executor of all my lands for ever, and leasehold property;" *sed vide* Prec. in Ch. 471,

tion of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters. It was contended that the real estate passed under this will.

Sed per Cur. Such was not the testator's intention. The purposes of the trust did not require it. Besides, the testator has used words sufficient to show that his will was not so; for he affords a comment upon the words *estate* and *effects*, by using, immediately after the end of those terms, the expression "or such effects as shall be upon his said farm." See 11 East, 290; 14 id. 370. [176]

12. *DOE, D. BURKITT, V. CHAPMAN.* E. T. 1789. C. P. 1 H. Bl. 223.

The testator, after giving certain real estates and some personal legacies, added "all the rest and residue of my estate, of what nature or kind soever, I give, devise, and bequeath to C. for her life, and after her decease to be equally divided between 'five persons;' and if any of them should die before they should be entitled to have and receive their share, then their children to have the same; and be directed that the share of one who was a minor, and also the shares of the children of any who should die, should be paid to their guardians, whose receipt should be a sufficient discharge." Testator died seized of some freehold and copyhold lands, not specially devised; the latter had been surrendered to the use of his will. It was contended that these lands were not meant to pass by the residuary clause, the phrases and the manner of the gift being wholly appropriated to personal property; but the Court were of opinion that they passed, it being the intent of the testator not to die intestate as to any part of his property, as plainly appeared, both from the comprehensiveness of terms used by him, and from his having surrendered the copyholds.

13. *NEWLAND V. MAJORIBANKS.* M. T. 1810. C. P. 5 Taunt. 268; S. C. 1 Marsh, 44.

This was a devise of all the rest, residue, &c. of testator's estate, of *whatsoever nature or kind the same might be*, and of which he might be possessed or interested in, at the time of his decease, to trustees, to put and place out the same in some public or private funds, *on good and sufficient security*, with power to call in, remove, or new place out the same, and to receive the annual interest or produce thereof for ten years after his decease; in trust to place out the same annually in like manner, so that *the interest might become a principal sum*; and at the end of ten years to apply the annual interest of the whole of such principal money in the erection of a free school to be under the management of the trustees *and their heirs*, but the annual interest only to be so applied. It was made a question whether the real estate passed by the estate.

Sir J. Mansfield, C. J., was of opinion that, though the words used were sufficient to comprehend the realty, yet that they were restrained to personal estate by the subsequent part, which referred to personalty only. "Land (he said) could not be placed out, nor securities changed." Heath, J., on the contrary, thought that the words were insufficient to control the preceding devise; as he was of opinion, however, that the trustees took a term of ten years only, which were expired, it was unnecessary to decide the point.

14. *HOPEWELL V. ACKLAND.* H. T. 1709. C. P. Salk. 239; S. C. 1 Com.

164. S. P. ROE, D. ALLPORT. V. BACON, H. T. 1815. K. B. 4 M. & S. 366.*

A person devised his manor of B. to A. and his heirs, and then proceeded thus:—"Item, I devise all my lands, tenements, and hereditaments to the said A. Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of, to the said A., he paying my debts and legacies." Lord Chief Justice Trevor, held that, under the concluding clause, "whatever he had disposed of," an estate in fee passed.

15. *PITMAN V. STEVENS.* E. T. 1812. K. B. 15 East, 505.

A will run thus: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after, &c; I appoint P. my

* In this case the words "my proportionable share" was held sufficient to pass the estate of one brother to another.

of, real and personal." *residuary legatee and executor.*" He then went on to give certain annuities and legacies. The Court held, that the obvious meaning of the whole will was, that P. should take all the real as well as personal property of the testator, subject to the payment of the annuities and legacies.

See 1 Burr. 268; 5 T. R. 716; 8 id. 503; 10 East, 246; Ca. Temp. Talb. 157; Cowp. 657, 662; 1 Willes, 333; 12 Mod. 593; Noy. 48; Prec. in Ch. 471; Eq. Ca. Abr. 137; Doug. 759; 7 Bro. P. C. 487.

16. *BOWMAN V. MILBANKE.* E. T. 1664. K. B. 1 Lev. 130; S. C. 1 Sid. 191; S. C. T. Raym. 97.

(*Sed vide* this case.) The words inoperative of the devise were: "I give all to my mother." The Court held that lands could not pass.

17. *HOPE, D. BROWN, V. TAYLOR.* E. T. 1757. K. B. 1 Burr. 268. *And legacies, have in some instances carried land.* R. Johnson, being seised in fee of a copyhold estate, devised to J. W. his house situated at K., and 30l.; and to W. T. his sister's son, a house, with the ground and outhouses thereto belonging; and declared his will and meaning to be, that if either of the persons before-named died without issue lawfully begotten, then the said legacy should be divided equally between them that were left alive.—Adjudged that W. T. took an estate tail.

18. *DOE, D. TOFIELD, V. TOFIELD.* E. T. 1809. K. B. 11 East, 246. *So the words "personal estate."* *Per Cur.* It being clear, beyond all possibility of doubt, upon the face of the will, that the testator meant by the words, *all his personal estate*, (not what is ordinarily understood by them, but) such real property over which he had an absolute power of disposition and control, we have no hesitation in saying that the freehold passed by this description.

[178] 19. *HARDACRE V. NASH.* T. T. 1794. K. B. 5 T. R. 716. *Accordingly, where the testator having devised his real estate, added, "but in case either or both of my children should die before the decease of my wife E., then those legacies which are left them, shall vest in her for her benefit and disposal;" held that those words applied to the real estates, since* The testator gave to his son R., and to his daughter E., 150l. each, when of age, and then gave to his wife all the remaining parts of his estate, effects, &c., with all cash, &c. during her life; and at his decease he gave a freehold and a copyhold estate to his son R., and a copyhold estate to his daughter A.; but in case either, or both his children, should die before the decease of his wife, then those legacies which were then left for them should return to his wife for her sole use and benefit. The widow survived the son. The question was whether those words of remainder operated on the real estates before given to the son and daughter, or only referred to the pecuniary legacies? It was contended that the word "legacies," according to its general import, referred to the two bequests of 150l. each, and not to the estates.

Sed per Cur. We have considered the whole of the will, and are of opinion that those words act upon the real estates before given to the son and daughter. Considerable stress has been laid on the word legacies, and it was argued that it was an appropriate term, applicable to personal estate only. But the same technical and correct expressions are not to be expected from unlettered persons, as are usually found in wills drawn by professional men. Even if there were no decision to warrant the Court in saying, that the word "legacy" might be applied to real estate if the context required it; we should have had no difficulty in making such a determination for the first time. But that construction has been already put on the word "legacy" in the case of *Hope v. Taylor*; 1 Burr. 269; where the Court fully subscribed to that doctrine. *So, real estate has been held on to pass by the word "effects" in a devise, where the intention was apparent.* the word "legacy" might refer to real property, if the testator's intention appeared so from the context.

20. *DOE, D. CHILCOT, V. WHITE.* M. T. 1800, K. B. 1 East, 33.

A. B. by his will, after making several pecuniary bequests, devised to C. D. the income of a certain cottage, she living in it if she thought proper, and to E. F. the half of a certain estate, and all the rest and residue of his goods, &c., and also his lands, &c. he gave to his wife for life, with power to give *what she thought proper of his said effects* to her sisters, the said A. B. and C. D., for their lives: and after the death of his wife and her two sisters, he gave all his lands, &c. to his heir at law. The question now was, whether the widow had power to devise to his sisters, the *real*, as well as personal, estate, before bequeathed to her by her husband. *Per Cur.* The testator's intention

is clear and obvious; viz. to give the widow a power over the property, both real and personal, which, in the previous part of the will had been bequeathed to her; and this is confirmed, by the terms of the devise, to the "heir at law," who is not to take any thing till after the death of all the sisters. See 1 Saund. 186; Doug. 40; 2 P. Wms. 182; 1 Burr. 268.

21. DEN, D. FRANKLIN, v. TROUT. E. T. 1812. K. B. 15 East, 394.

A. B. devised to E. F. "all his estates and effects whatsoever and where-soever which he was possessed of or entitled to at the time of his decease," in trust to pay funeral expences and debts. The testator then subjected "his said effects bequeathed to E. F." to the following legacies, and went on to enumerate certain legacies and gave to S. a house in W. He directed that all the above legacies should be paid out of his effects, by the said E. F., within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his said effects to the said E. F., her heirs and assigns for ever. The question was, whether the remainder in fee, in the house passed to S. (which was the testator's only real property) by this devise.

Per Cur. The intention of the testatrix to pass the remainder in fee in the house to E. F., is perfectly clear. The last devise makes it so. See 11 East, 290; 4 T. R. 292.

22. ROE, D. WALKER, v. WALKER. E. T. 1803. C. P. 3 B. & P. 375.

A. B. devised to his wife his house and goods, with all his lands, goods, and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons, till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels equally, to be divided between all his sons and daughters, share and share alike. It was contended, that, under the last clause of the will, the lands passed. But although the Court observed, that strong conjectures might arise, as to what the deviser intended to do, from the previous devise to his wife and his younger children, yet it was not of necessity to intend that he meant to have added the word "land" in the last clause of his will. On the principle, therefore, that no mistake in a will could ever be rectified by the Court, unless it could be first demonstrated, that such mistake did exist, they decided, that the realty was not affected by the will.

4th. With reference to the quantity of property acquired.

1. In general.

(a) Introductory expressions.

DOE, D. SPEARING, v. BUCKNER. E. T. 1796. K. B. 6 T. R. 610.

A testator entitled to a house, his only real estate, and to a large personal estate, began his will with saying: "As to my real and personal estate, I dispose thereof in manner following." He then gave several legacies and an annuity, which later he charged on the house; and, after bequeathing a sum of 4,000*l.* upon certain trusts, all the rest and residue of his estate and effects of any and what nature or kind soever, or wheresoever, he gave and bequeathed to A. and B., their executors or administrators, in trust, to add the interest to the principal, so as to accumulate the same; it being his will, that the said residue should not be paid, or payable, but at the time and in the manner the principal sum of 4,000*l.* was therein-before directed to be paid. The question was, whether the house passed by the will.

Per Cur. The testator's freehold property did not pass under any clause of the will; but goes to the heir at law. The testator set out in the beginning of his will, as if he had intended to dispose of all his property. But although those general words would have shown his intention, if there had been subsequent words in the will to carry that intent into execution, as was held by Lord Talbot, in Ibbotson v. Beckwith, Ca. Temp. Talb. 157; it has been held in a

* On this case, Mr. Jarman (2 Powell, 184.) observes, that, as the testator had, in the second devise, used precisely the same phraseology as in the first, with the omission of a single word, and that word the only one which comprehended the land, it was too much to infer that the words *house, goods, and chattels*, with so material an omission, were intended to describe the same subject, as the preceding expressions, however reasonable might be the conjecture that the omission was undesigned.

variety of cases (*vide* Cowp. 660, 661; Dougl. 759; and Goodright, d. Baker, v. Stocker, 5 T. R. 13,) that alone they are not sufficient to dispose of a fee; and by adverting to the residuary clause, there are no words to pass the estate in question.

(b) *When restrained by subsequent words.**

Where there is a correct and specific description of the property devised, a mistake in any additional words will have no effect.

1. *HASTED V. SEARLE*. T. T. 1774. 1 Ld. Raym. 728. S. P. ST. JOHN V. WINTON. K. B. Cowp. 94, reversing the judgment of the Common Pleas, in 2 Bl. Rep. 930.

A person made his will in these words—"I do devise to J. S. all those my lands in B., in the county of S., in the possession of J. A.," whereas, in fact, the testator had not any lands in S.; but he had lands at B., in H., in the possession of J. A. In an ejectment brought for these lands, in H., by the heir of the testator, against the devisee, it was ruled by Lord Holt, that they passed by the devise.

7. *PAUL V. PAUL*. M. T. 1760. K. B. 2 Burr. 1089; S. C. 1 Bl. Rep. 255. S. P. *DOE, D. PARKIN V. PARKIN*. H. T. 1814. C. P. 5 Taunt. 321. S. P. *MARSHALL V. HOPKINS*. E. T. 1812. K. B. 15 East, 309. S. P. *DOE, D. BEACH, V. THE EARL OF JERSEY*. E. T. 1818. K. B. 1 B & A. 550.

But where the first description is merely general, these additional words will be considered, either explanatory, or restrictive, according to the intent of the testator.

A. B. devised to his wife his farm, at B., in the tenure and occupation of J. S.; he devised to her several other estates in the same manner; and concluded by a general devise to her of all his freehold and copyhold lands above devised. The farm at B. was copyhold, and was demised to J. S., with an exception of the woods and underwoods. The heir at law brought an ejectment for the woods; and the question was, whether they passed by the will, not being in the tenure and occupation of J. S. Lord Mansfield held that the words "in the tenure and occupation of J. S." were not words of restriction, but of additional description. Had the testator meant them as restrictive, he would have said, "all that part of my farm, or so much of my farm, as is in the tenure," &c. The farm was an entire thing.—Judgment was given for the devisee.

2. *As to a general devise.*

(a) *When confined to freehold lands.*

[181]
Where a person hath lands in fee and lands for years, and deviseth all his lands and hereditaments, the fee simple lands pass only; but if he hath no fee simple, the lease for years passeth.

1. *PISTOL, D. RANDAL, V. RICCARDSON*. T. T. 1788. C. P. 1 H. Bl. 26. n.
The testator devised "all and every of his several lands, messuages, tenements, and hereditaments, whatsoever and wheresoever, whereof he was seised and interested in, or entitled to," to his son for life; remainder to the heirs of his body. He then devised his *personal estate* to his wife and daughter, and made the wife sole executrix. The question was, whether the son took the leasehold lands by the above words of the will, or whether they were part of the personal estate. The Court were of opinion, that the leasehold-lands did not pass to the son, but were part of the personal estate.

2. *THOMPSON V. LAWLEY*. M. T. 1800. C. P. 2 R. & P. 303.

A. B. devised his "manors, messuages, lands, tenements, and hereditaments," to trustees and their heirs to certain uses, in strict settlement, with the ultimate reversion to his right heirs. Upon a question put by the Court of Chancery, whether leasehold passed under such general devise, Lord Eldon stated the reasons for the certificate; and, after observing that Lord Kenyon had said, 6 T. R. 345. that it was the duty of courts of justice to give effect to the devisor's intention, as far as they could consistently with the rules of law, not conjecturing, but expounding, his will from the words used, said; that, whether the rule in *Rose v. Bartlett*, Cro. Car. 292. were wisely adopted or not, it was unnecessary to determine; for it must, until expressly over-ruled, which, he observed, he did not see the expediency of, govern this case. He said that it was also to be recollected, that no one of those particular circumstances, which had been relied on, in other cases, existed in this. It does not,

* *Vide ante*, vol. vii. p. 689.

† As to this, see also the famous case of *Rose v. Bartlett*, Cro. Car. 298; and also 3 P. Wms. 26; 2 Eq. Ca. Abr. 326, pl. 24; Fitzg. 116; 2 Atk. 456; 1 Ves. sen. 270; 2 Ves. & Bea. 337. The latter part of this rule is founded on another general maxim in the construction of all wills, that some effect must, if possible, be given to what may be supposed to be the testator's intention.

continued he, appear, that there was any equitable right of renewal, nor even the premises in question blended in enjoyment, or otherwise, with any freehold land; there was no difficulty in distinguishing them from each other; they had never been devised together, at one rent reserved to heirs; they were short terms. All the other judges said, the rule in *Rose v. Bartlett* ought not to be shaken; and the Court certified that the leasehold houses did not pass by the general devise. See 1 P. Wms. 286; 1 Bro. Ch. Ca. 78; 5 Bro. P. C. 435; 6 Ves. 633.

3. *DOE, D. BELASTYSE, v. THE EARL OF LUCAN.* E. T. 1808. K. B. 9 East, 448.

S. P. LANE v. STANHOPE. E. T. 1808. K. B. 6 T. R. 345.

A. B. being seized in fee of a freehold manor of Sutton, and divers freehold lands, &c. within the manor, and also of freeholds at N. not within the said manor; and being entitled in fee simple to all the copyhold or customary premises within the said manor, all which lands lay in the county of Chester; and being also similarly seized of freeholds in the counties of York, Durham, and Middlesex; and having three daughters, A., B., and C., devised certain freeholds to trustees for a term, to raise for A. a certain annuity for his life, &c. He then devised other freehold lands, in the same counties, as follows: all and singular the manors, or reputed manors of, &c. and all his messuages, farms, lands, tenements, and hereditaments, whatsoever, within the precincts and territories of the said, &c. with their respective rights, members, and appurtenances, unto Z., and Q. (the husband of B.) in trust, to raise 500*l.* yearly, for B., &c. And also devised as follows: all and singular the manor, or reputed manor, or reputed manor, of Sutton, and all messuages, farms, lands, tenements, and hereditaments, whatsoever, within the precincts and territories of Sutton, in the county of Chester, with their rights, members, and appurtenances, to Z. and Q. for a term, in trust to raise 500*l.* yearly to C. for her separate use; and, after certain remainders, to go to the testator's own right heirs. The testator then empowered the several tenants for life, to charge the respective estates with 500*l.* for the use of any persons with whom they might intermarry. He also enabled them to charge the estate, with portions for the children. C. was enabled to raise 10,000*l.* A power of leasing for 21 years was also given to all the tenants for life. And the testator devised all the rest, residue, and remainder, of his real and personal estates whatsoever and wheresoever, except mortgages and trust property, to A., her heirs, &c. It appeared that the manor of Sutton and the freeholds within it, devised to C. were worth 800*l.* yearly; that the copyholds at Sutton were of the same value. The question now was, whether C. was entitled to the possession of certain copyholds, part of which were severally situated within the town and freehold manor of Sutton, and part in the township of K., without the manor of Sutton; and all of which copyholds were held of the manor of M.; and also of certain freeholds in the parish of N., in the same county and not within either of the manors of which those lands were held. The question principally arose on the devise to trustees for the benefit of C. and her issue, of "all and singular the manor, or reputed manor, of Sutton, and all my messuages, farms, lands, tenements, and hereditaments whatsoever, within the precincts or territories of Sutton, in the County of Chester, with their rights, members, and appurtenances." It was admitted, that the manor of Sutton, and the freehold estate within that manor, passed to C. But it was contended, that the copyhold estate within the ambit of Sutton, but parcel of the manor of M., did not pass; 1st, because it was not "within the precincts or territories of Sutton," by which must be understood the manor of Sutton, and therefore not within the description of the thing devised; and that, besides, another reason existed, why this copyhold did not pass by the general description of lands, &c., viz. because there was a freehold estate to answer the description; and, lastly, it was urged, that the remainder of the property claimed, clearly passed under the residuary clause, being without the ambit of Sutton. *Per Cur.* In construing the devise in question, we shall proceed on the words used in the will, guided by the testator's intention. First, he gives C. his manor, or reputed manor, of Sutton; then he gives her

[183] "all his messuages, farms, lands, tenements, and hereditaments, whatsoever, not within the manor, but within the precincts or territories of Sutton." The principal question is, whether the copyhold within the township, but not parcel of the manor of Sutton, passed by this devise to C.; for, if not, the testator having given to A. all the rest and residue of his real estates, it is clear that this residuary clause would carry every thing, copyhold as well as freehold, which he had not before devised. Now, the words used are general; the word *farms*, at least, would include copyhold as well as freehold; and we should incline to be of opinion that even *lands, tenements, and hereditaments*, might include both, if such a construction were necessary to give effect to the apparent intention of the testator. Then we see no ground for restraining the sense of the general words "within the precincts and territories of Sutton" to the manor of Sutton. The contrary intention is, we think, to be collected, from the testator's first mentioning, the manor of Sutton, and extending his description of the property devised to *all his messuages, farms, lands, &c. within the precincts and territories of Sutton*. We must, therefore, take it, that, by the change of expression, he meant something more than the manor, which must be the township of Sutton. Then again, when it is considered that he had only freehold in Sutton to the amount of 800*l.* per annum, we cannot think that he meant to devise that alone, limited too as it is in strict settlement, when such large charges are laid on it;—500*l.* a year to C. and 10,000*l.* for younger children, with power to her to charge the estates with 500*l.* per annum for her husband. The other property, however, lying out of Sutton, which it was contended, passed by the residuary clause, must be allowed to do so. We are, consequently, of opinion that, from the words of the devise, and from the apparent intention of the testator on the whole of the will, the copyhold in Sutton passed to C.'s trustees; and that the other estates, out of Sutton, passed by the residuary clause. See 8 East, 91; Cro. Car. 293; 3 Bro. Ch. Ca. 188; 2 B. & P. 303; 5 Ves. jun. 476; 7 East, 20; Doug. 716. n.; 3 Atk. 73; 6 Vin. Abr. 237; Copyhold, W. c. pl. 123; 3 P. Wms. 322; 2 Atk. 85; 1 Ves. 226; 2 id. 164.

4. SHEFFIELD V. MULGRAVE. E. T. 1794. K. B. 5 T. R. 571.

The above rule applies to leaseholds for years only, and not to leaseholds for lives, which will pass under a general devise with freeholds of inheritance, when the limits of [184] tions are not of such a nature as to raise a contrary presumption.

Testator devised all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is herein-after mentioned and devised," to the use of his children successively in strict settlement; and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed, if those two children, or either, should be living at his death; and that their lives, or that of the survivor, should be inserted in the new lease, and the fine paid out of his personal estate. He then gave part of his personal property specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real; but afterwards, by a testamentary paper, unattested, he disposed of his personal otherwise; the heir contracted to sell the lease of the rectory; and, upon a case directed to the Court of King's Bench on a bill for specific performance, the Court certified, that the rectory was not comprised in the estate devised in strict settlement; but that it devolved upon the heir as special occupant, and that, as such, he took the absolute interest at law. And Lord Kenyon, C. J., in delivering his opinion, admitted that the words of the devise were sufficiently comprehensive; but he adverted to the direction to renew in the younger children's names, which appeared to be intended, though done in an awkward manner, by way of provision for them. The heir, therefore, took as special occupant; whether clothed with any part for the younger children was a question, his lordship added, for the consideration of the Court of Chancery.

4. ROE, D. PYE, V. BIRD. T. T. 1779. Ex. 2 Bl. Rep. 1301.

So the rule was holden not to prevent terms of years passing

In this case the question was, whether a mortgage term passed, with copyholds, under a devise, "of all that his (testator's) estate in B.," to M. B. and her heirs; and it was held that it did pass, principally on the ground, that the leasehold and copyhold lands had been held together for a great number of

years, and that the testator had contracted for the purchase of the equity of redemption of both.

(b) Operation of, as to reversions.

1. COOKE V. GERRARD. E. T. 1667. K. B. 1 Lev. 212; S. C. 1 Saund. 180. S. P. WILLOWS V. LYDCOT. M. T. 1688. Ex. 2 Vent. 285; S. C. 3 Mod. 229. S. P. DALBY V. CHAMPERNON. H. T. 1691. Skin. 631. S. P. WILLIAMS V. THOMAS. H. T. 1810. K. B. 12 East; 141. S. P. MORGAN V. JONES. Loft. 160. S. P. LYDCOT V. WILLOWS. M. T. 1688. K. B. 3 Mod. 229; S. C. Carth. 50; S. C. 2 Vent. 285. S. P. HYLEY V. HYLEY. T. T. 1687. K. B. 3 Mod. 228; S. C. Comb. 93. S. P. ROE, D. CALLOW, V. BOLTON. 2 Bl. 104; S. C. 2 Doug. 761. S. P. DOE, D. MORRIS, V. UNDERDOWN. Willes, 293.

A person settled part of his lands on his daughter for life, and devised another part to his wife for a year after his death, and then devised all his lands, not settled or devised, to T. H. and his heirs. Adjudged, that the reversion of the lands settled on his daughter passed by this devise.

2. DOE, D. EARL OF CHORMONDLEY, V. WEATHERBY, T. T. 1809. K. B. 11 East, 322.

A reversioner in fee having before devised certain other real estates in strict settlement, and given annuities for life to A., B., and C., which annuities he charged upon "all and singular his manors, lands, tenements, and hereditaments, &c. not before disposed of," devised "all and singular his said manors, lands, &c." and other his real estate so charged with and subject to the said three several annuities as aforesaid. It appeared that C. was tenant for life in the lands of which the deviser had the reversion, and as to whom, therefore, the charge in respect of those lands was void. The question was, whether such reversion passed. It was urged that it did not, inasmuch as it appeared clearly, on the face of the will, that the testator did not mean to pass any estates by the residuary clause, except such as were charged with the annuities, and, among the rest, with the annuity to C.; he could not, therefore, have meant to pass this reversion, which could not be subject to that charge, because C. had already an estate for life in the whole property, but he must have meant to confine the devise to such estates as he had in possession.

Sed Per Cur. By referring the charges of the three annuities to the several properties devised in the residuary clause, *singula singulis*, the devise will attach on all but this reversion, as to three annuities; and there is not a scintilla of intention upon the face of the will to show the contrary, which, by all the authorities, is necessary to except the reversion out of the general words of the residuary clause. See *Alleyn*, 28; 2 Vent. 285; 1 Eq. Cha. Ab. 211; 1 P. Wms. 302; 8 T. R. 118; 2 Burr. 912; 6 East, 494.

3. DOE, D. NETHACOTE, V. BARTLE. H. T. 1822. 5 B. & A. 492; S. C. 1 D. & R. 81. S. P. FREEMAN V. THE DUKE OF CHANDOS. M. T. 1775. K. B. Cowp. 363. S. P. ATKYNS V. ATKYNS. E. T. 1778. K. B. Cowp. 808. S. P. GOODRIGHT V. THE MARQUES OF DOWNSHIRE. 2 B. & P. 600.

A person having, in the parish of A., lands of which he was tenant in fee, and lands which had been settled to the use of himself for life, remainder to his wife for life, remainder to their issue in tail, with the ultimate reversion in himself in fee (both of which were in his own occupation) devised unto his wife all his freehold and copyhold lands, of which he was then in the immediate possession, lying in the several parishes of A. & B., and also all his reversionary estate, expectant on the death of his mother, in other lands in A. and B. to his said wife for life, remainder to his daughter in fee. The Court held, that the reversions in the settled lands passed, although the wife was tenant for life, and the daughter tenant in tail, in those lands under the settlement.

4. STRONG V. TEATT. H. T. 1760. K. B. 2 Burr. 912. Judgment affirmed. DAN. PROC. 3 BRO. P. C. Tomlin's Ed. 219. S. P. SMITH, D. DAVIES V. SAUNDERS. 2 Bl. Rep. 736.

A. M., on the marriage of his eldest son H., settled the manor of A. on

with copy holds of inheritance, where the two had been held together for a great number of years. Whenever a testator shows an intention to dispose of all his property by his will, and uses words sufficient for that purpose, any estate to which he is entitled in reversion will pass; Unless they are expressly, or by necessary implication [185] excluded from its operation. And the aptitude of some of the limitations, will be no ground of exclusion. For altho', where the

reversion was even in such a case, the only property subject to the general devise, earlier authorities excluded the reversion; himself for life, remainder to his son H. for life, remainder to the first and other sons of H. in tail, &c. with the reversion in fee to the father. A. M. had issue three other sons, L. J. and T. and four daughters; and being seised of other lands in fee simple, he made his will, by which he devised all those lands whereof he was seised in fee simple in possession to his wife, and also all other the lands, tenements, and hereditaments whereof he was seised in fee simple, or of which any other person was seised in trust for him; with a proviso, that if his sons H. and L. (who were his first and second sons) should both of them die without issue male, in the life time of his son J. (who was his third son) whereby the estate settled on his son H. on his marriage should descend on his son J. that then his son J. should not take any interest or estate in the lands therein before devised to him. The question was whether the reversion in fee of the lands which were settled on H. should pass by this devise. The Court of King's Bench, in Ireland, gave judgment that the reversion in fee did pass; but this judgment was reversed by the Court of King's Bench in England; and Lord Mansfield, in delivering the opinion of the Court, observed that the words used by the testator were certainly sufficient to carry the reversion in fee of the lands settled on H. if they had not been restrained by other words and expressions; and that the clause in the will (besides several others) which directed that, in case H. and L. should die without issue male, in the life-time of his son J. whereby the estate stated on H. should descend to J. then J. should not take any estate in the lands devised to him, proved to a demonstration, that the testator did not mean to devise this reversion; for if he had, then it could never go to J.

[186]

Of which Doe, d. James v. Avis, is the strongest.

And altho' accordingly where A. being seised of the reversion of lands at P. in fee expectant upon another estate, by a marriage settlement settled in a particular mode, and also seised in fee of a coppiece, devised all his real property not settled in joint reversion in question. The question was, whether the reversion passed. The Court held, that it did not. They admitted that the general words, if unrestrained, would carry the reversion, but as the daughters had estates tail in the settled lands, so that the testator had no disposable interest, unless they both died without issue, if these lands were included, the devise to C. in tail was necessarily inoperative; since she had an estate of the same duration under

187 | which he declared should al

5. DOE, D. JAMES, V. AIRS. E. T. 1792. K. B. 4 T. R. 605.

Testator devised his lands to his wife for life, and after her decease to be equally divided between his four children, and to each of them and their heirs for ever, share and share alike; and, in case they should be minded, and agree among themselves to sell the whole, then every one of them should have their equal shares of the moneys from thence arising; but if they agreed to keep the estate whole together, then all the rents, &c. from time to time as they should become due, should be equally paid and divided between his said children, and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike. The Court held that the children took only estates tail; for, although the devise was to them and their heirs, and they had also a power of selling, yet the subsequent words restrained the operation of these former ones, and rendered the estate devised an estate tail.

6. GOODTITLE, D. DANIEL, V. MILES. E. T. 1805. K. B. 6 East, 494; S. C. Smith's Rep. 467.

On the marriage of A. with B., lands had been settled to the use of A. for life; remainder to B. for life for her jointure; remainder to the heirs of the body of B. by A. to be begotten; remainder to the right heirs of A. A. survived his wife, having had by her two daughters, C. & D. who survived him, and were his heirs at law. By his will, A. devised to his daughter C. and to the heirs of her body lawfully begotten, certain freehold lands, of which he was seised in fee in possession; and all others his freehold, copyhold, and leasehold, lands, which he should be possessed of, or entitled to, at the time of his decease, and which were not settled in jointure on his late wife; the said daughter, and the heirs of her body, paying thereout to his daughter D. 1*l*. yearly during her life; and in case his daughter C. should happen to die and leave no issue of her body, he devised the lands to his daughter D. for life; and, after her decease, to her children then living; and, for want of such issue, then over. The deviser had no real estate, other than lands expressly devised, besides the reversion in question. The question was, whether the reversion passed. The Court held, that it did not. They admitted that the general words, if unrestrained, would carry the reversion, but as the daughters had estates tail in the settled lands, so that the testator had no disposable interest, unless they both died without issue, if these lands were included, the devise to C. in tail was necessarily inoperative; since she had an estate of the same duration under

the settlement; she would then be tenant in tail general under the will, expectant on the determination of an estate tail general, already subsisting in herself under the settlement. The same observation, they said, applied to the devise to his daughter D. for her life; remainder to her children, which could not possibly take effect. Upon this ground, and adverting also to the restriction of the devise to lands not settled in jointure on his wife, they held that the reversion did not pass. See 1 Lev. 212; 1 Saund. 181; 3 Mod. 229; and 2 Vent. 285; 2 Vern. 121; Fitzg. 150; 3 P. Wms. 56.

marriage settlement, it was held that the devise could not apply to such particular objects of the testator's bounty; later decisions seem to have altered the rule; vide *Church v. Mundy*, 12 Ves. 426; and 15 Ves. 396; 2 Ves. et Bea. 187.

(c) Operation of, as to copyholds.*

(d) Operation of, as to mortgages and trust estates.

1. LITTLETON'S CASE. E. T. 1681. 2 Vent. 351.

In this case it was laid down that if a man had but the trust of a mortgage of lands in D., and had other lands in D., by a devise of all his lands in D., the trust would pass. See 2 P. Wms. 198; 4 Ves. 147; 5 id. 340; 6 id. 577; 8 id. 435; 1 Atk. 605; 1 Bro. Ch. Ca. 197.

2. ROE, D. READE, v. READE. H. T. 1793. K. B. 8 T. R. 118.

A. B. devised to his wife for life, and after her death to C. D., and his heirs, upon such trusts as he should by will direct, limit, or appoint. A. B. died and C. D., devisee and trustee, made his will; and after devising some land in W. and an estate in D. concluded: and all the rest of my ready money, and securities for money, stocks in the funds, goods, chattels, real and personal estates and effects whatsoever and wheresoever, of what nature or kind soever, as well copyhold estates as all other estates, &c., I give and devise unto my son, E. F., after the payment of my debts, legacies, and funeral expenses. The question was, whether the present estate over which he had the power of appointment passed? *Per Cur.* In this case, the trustee had no beneficial interest in himself; he was a mere naked trustee, though the use was executed in him. And when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates "after payment of his debts, legacies, and funeral expenses." Now these latter govern and restrain the general effect of the former words, and show that he only meant to give that, in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts. This satisfies us that he had no idea of disposing of the trust estate; and therefore, we think, that the estate in question did not pass by the residuary clause in this will.

See 2 Ch. Rep. 51; 10 Ves. 101; 8 Ves. 273; 4 Mod. 438; 1 M'Lel. & Younge, 292; 1 Jac. & Walk. 494; 3 Ves. & Bea. 45.

(e) Operation of, in regard to lapsed or void devises.

1. GOODRIGHT v. ORIE. E. T. 1772. K. B. 8 Mod. 123.

It appeared that the testator, being seised in fee of several lands devised "all his said lands" to five persons, (naming them) and to their heirs, as tenants in common; that J. P. one of the said devisees, died two years before the testator, who, by another clause in the will, devised "all his other messuages, lands, &c., not therein before given, devised, or bequeathed, and all his money, household goods, plate, rings, &c., and all his estate real and personal

* Since the passing of the 55 G. 3. c. 195. (vide ante, vol. vi. p. 410. n.), freeholds and copyholds are placed *pari passu*, in regard to the operation of a general devise. See 2 Powell on Dev. by Jarnan. p. 121., where this deduction is shown to be clearly supportable, both from authority and general reasoning.

Customary freeholds were excluded from a devise of freehold property, from their having been generally reported as copyhold, and the deviser having distinguished, in other parts of his will, between freehold and copyhold; *Roe, d. Conolly, v. Vernon*, 5 East, 57; 8 C. 2 Smith's Rep. 318.

† Lands which are in mortgage, and whereof the deviser has only the equity of redemption, will pass by the same words as lands not mortgaged; because a mortgage is only considered as a pledge for securing the payment of a debt, and the lands remain in the mortgage for every other purpose; 1 Ch. Rep. 101; 6 Cru. Dig. 222.

The legal estate of a trustee or mortgagee, will pass under a general devise of lands;

Unless a contrary intention can be collected from the testator's expressions; or from pur-
[138]
poses, or limitations, to which he has subjected the lands so devised.†

In the case of Goodright v. Orie, the judges were divided in opinion, as to whether the share of one, of several tenants in common, in fee, dy

ing in the life time of the devisor, belonged to him, or to the residuary legatee. whatsoever, of what nature or kind soever," to his two nieces, M. B. and M. O., their heirs, executors, and administrators; that the testator died without making disposition of the said fifth part of his lands, otherwise than by his last will as aforesaid. The question was, whether the same should descend to the heir at law of the testator, as not being disposed of by him in his life, because the devisee died before him; or, whether it should pass to M. B. and M. O. as residuary legatees, by the latter clause of the will, as an estate not before disposed of by the testator. The Court were divided in opinion.

2. WRIGHT v. HORNE. H. T. 1773. K. B. 8 Mod. 224.

The question was afterwards settled in favour of the heir [189] But a residuary clause, was in this case, holden to exclude the heir at law, from a *quasi* lapsed bequest, which the devisee was never capable of taking.

A testator devised thus: "all that my messuage in Edmonton to A. and his heirs;" and "all the rest and residue of my messuages, lands, tenements, and hereditaments, in Edmonton and elsewhere, to B. and his heirs for ever." A. died in the life time of the testator. The Court held, that the messuage in Edmonton should not go to B., but to the heir at law of the testator.

3. DOE, D. STEWARD, v. SHEFFIELD. E. T. 1811. K. B. 13 East, 526..

A testator devised certain premises to the sisters of J. H., as tenants in common in fee; and by a subsequent clause he devised to S. certain other real estates, and all his other lands and hereditaments whatsoever and wheresoever the same might be, which he was in any manner entitled to, or interested in, and exclude the not hereinbefore disposed of, to hold to him, his heirs, &c. There had been three sisters of J. H., but at the time of the will only one was living. The Court decided that she took the whole; but, in delivering his judgment, Lord Ellenborough said: but even if the surviving sister were not entitled to take the whole, the heir at law could not be entitled to any part of the residue undisposed of, for this is not the case of a lapsed legacy; but the residuary devisee is to take all other his lands, hereditaments, and premises, whatsoever and wheresoever, *not therein before disposed of, and all other his real and personal estates whatsoever*, in the most comprehensive terms. Then, admitting the law to be as stated in the cases cited on the part of the heir at law, with respect to lapsed legacies, this is not a lapsed legacy. Mr. Justice Le Blanc and Mr. Justice Bayley both expressed their concurrence in this doctrine, the former, however, appearing to think the case stronger in favour of the residuary devisee without the words "not before disposed of, though he thought him entitled either way. See Foster, 182 184; Willes, 293; 2 Vern. 394; 2 Ves. 285; 18 Ves. 463; 1 Sim. & Stu. 293; 3 P. Wms. 683; 2 Ves. & Bea. 294.

(f) Operation of, in respect to undisposed of interests.

DOE, D. WELLS v. SCOTT. H. T. 1814. K. B. 3 M. & S. 300. S. P. COOKE v. GERRARD. 1 Lev. 212. S. P. LYDCOT v. WILLOWS. K. B. 1 Vent. 285; S. C. 3 Mod. 229; S. P. GOODTITLE, D. HART, v. KNOT. E. T. 1774. K. B. Cowp. 43. S. P. SMITH, D. DAVIS, v. SANDERS. C. P. 2 Bl. Rep. 736; S. C. Cowp. 420.

Where a specific devise disposes only of a partial, or contingent, leaving an ulterior, or alternate, interest undisposed of that would, in the absence of disposition, descend to the heir, such undisposed interest will pass by a general residuary devise.*

A testator devised all his lands and hereditaments to J. H., his cousin and heir at law, his heirs and assigns for ever, provided that he or his heirs did, within six months after his decease, assure to R. M. and his children, the copyhold tenements at R., and, in default thereof, to R. M. for life; and from and after his decease to his children living at the time of his decease, their heirs and assigns for ever, as tenants in common. J. H. and R. M. died, unmarried, before the devisor. The Court held, that the specific devise being incomplete as a disposition of the whole absolute fee, inasmuch as it did not dispose of the interest which remained to be disposed of, if A. should not assure the copyhold estate to B., and B. should die without children, the necessary consequence was, that the interest depending on those contingencies passed by the general residuary clause. See 8 Ves. 25; 15 id. 415; 3 P. Wms. 55; 11

* But if, after carving out partial or contingent interests, the devisor limits the reversion in fee to his own heirs, though the devise be inoperative in law to break the descent, yet it is considered as indicating an intention to exclude this property from the operation of the residuary clause, and accordingly such reversion descends to the heir; Amesbury v. Brown, cited 2 Blac. 789; Robinson v. Knight, 2 Eden. C. C. 155; Smith, d. Davis, v. Saunders, 2 Blac. 786; S. C. Cowp. 420.

East, 322; 6 East, 494; Willes, 296; 13 East, 526; Fortesc. 184; 1 Ves. 420; 1 Wils. 105; 2 B. & P. 603.

(g) *Operation of, on a power of appointment.**

3. *As to whether property acquired since making the will passes.*

(a) *In general.*

SELWYN v. SELWYN. H. T. 1760. K. B. 2 Burr. 1131; S. C. 1 Bl. Rep. 222. A deviser can only devise the land, to which he is actually entitled. at the time of making the will. Lands will, however, pass by a will, made before a recovery is completely suffered, if the will be after the deed to lead the uses.

A. being tenant for life, remainder to B. in tail, by a bargain and sale, dated 20th of April, 1751, conveyed to a tenant to the *præcipe* in order to suffer a common recovery, the uses of which were declared to be to A. for life; remainder to B. in fee. Trinity Term began on the 7th of June, 1751. On the 8th, B. made a will, whereby he disposed of all his real estate. In the same term a writ of entry was sued out, returnable *Quinden*. Trin. 16th of June, and the recovery was completed the same term. On a case from Chancery, the Court of King's Bench certified that the will was not revoked, considering the deed and recovery as one conveyance, and that the whole had relation to the date of the former.

(b) *In the case of republication.*

(a) *General rule.*

GOODTITLE, D. WOODHOUSE, v. MEREDITH. M. T. 1813. K. B. 2 M. & S. 5.

S. P. BEABLE v. DODD. E. T. 1786. K. B. 1 T. R. 193. S. P. WORSLEY v. CRAVEN. cited id. 201.

A testator having by a will duly attested devised all his lands, subsequently purchased a freehold estate, and then by a codicil, attested by three witnesses, devised certain real property, but not including the estate in question. The Court held that the will, being republished by the codicil, included that estate, and the learned judges (who delivered their opinions *seriatim*) treated it as a point quite settled. See Vin. Abr. Devise, Z. 22; Com. 381; 1 Ves. jun. 486; 4 Bro. Ch. R. 2; 7 Ves. 98. 499; 10 East, 242; 2 B. & P. 500.

(b) *1) Where the object of republication is apparent on the face of the instrument.*

STRATHMORE v. BOWES. H. T. 1798. K. B. 7 T. R. 482. Judgment affirmed. [191]

T. T. 1801, Dom. Proc. 2 B. & P. 500.

Testator devised all his freehold and copyhold manors, &c. to six trustees, for certain purposes. He afterwards purchased other estates, and then made a codicil; whereby he revoked all the above devise, as far as it related to two of the trustees, and then devised his said lands, &c. to the other trustees, upon the same trusts as he had devised the same by his said will; and he concluded with declaring his codicil to be part of his will. The question turned on the effect of the codicil to pass the after-purchased lands. The counsel for the devisee urged the introductory words of the codicil, as showing an intent to pass all the testator then had. To these words he contended the subsequent ones said and same have relation. He further insisted upon the concluding words of the codicil, as incorporating the two instruments, and by bringing down the will to the date of the codicil, passing all the lands the testator then had. But the Court certified that the codicil was not a republication of the will, so as to extend its operation to the after-purchased estates.

4. *As to the effect of particular forms of expression.*

(a) *In general.*

(a) *1) All my lands.†*

* A residuary clause, giving all my estates, of what nature or kind soever, in B. and C. or elsewhere in England, after payment of my debts; will not alone pass an estate in D., in which the testator had a mere power of appointment; Roe, d. Reade, v. Reade, 6 T. R. 118; Doe, d. Hillings, v. Bird, 11 East, 49; *et post*, tit. Howers.

† The words "all my lands" are sufficient to pass a house. If, however, it appears, not to have been the intention of the testator to give a house by those words, they will not have that effect; Cro. Eliz. 477. 674. The word "all" will not, it is said, *per se*, pass a fee; 3 Mod. 32; T. Raymond, 97.

BAGNELL V. ARNETT. T. T. 1692. C. P. 4 Mod. 141. S. P. WILSON V. ROBINSON 1 Mod. 101; S. C. 3 Keb. 180; S. C. 2 Lev. 91. S. P. SCOTT V. ALBANY. 8 Com. 338. S. P. DOUSE V. ERIE. 3 Lev. 264; S. C. Vent. 126. S. P. GAMAGE'S CASE, 1 Vent. 368. S. P. LANE V. HAWKINS. 2 Show. 396. S. P. REEVES V. WINNINGTON. 3 Mod. 45; S. C. 2 Show. 249. S. P. CARTER V. HORNER. 4 Mod. 90; S. C. 1 Show. 348. S. P. BOWMAN V. MILLBANKE. T. Raymond, 97.

The words "all my lands," are in general taken in their most comprehensive sense.

A. B. having lands called A. and B., devised all his lands to trustees for the payment of debts, until C. D. attained 21; and then gave the lands called A. for certain purposes, and finally to C. D., taking no notice of the land called B. But the Court held that B. should pass; for, there being a sufficient description in the first part of the will, "all my lands," it could not be controlled by the subsequent imperfect explanation.

[192]

(b 1) *All my mortgages.**

(c 1) *All my lands out of settlement.†*

(d 1) *Appurtenances.*

Land occupied with a house, and highly convenient for the use of it, will pass in a will by the word "appurtenances," though held for a different term.

1. DOE, D. LEMPRIERE, V. MARTIN. E. T. 1777. C. P. 2 Bl. Rep. 1148. S. P. ARCHER V. BENNETT. 1 Lev. 134; S. C. 1 Sid. 211.

In this case, there was a devise of testator's copyhold messuages, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., then in testator's own possession. The Court held that the word "appurtenances" included a small piece of land, being the scite of several cottages pulled down by the testator, who had laid the ground open to his Court-yard, and thus occupied it with the house, though it was held for a different term.

2. BUCK, D. WHALLEY, V. NURTON. T. T. 1797. C. P. 1 B. & P. 53.

In this case there was a direction, by a deviser, that his steward should enjoy his mansion-house, *with the appurtenances*, for one year after his death.

The Court held, that the terms of such devise included gardens, shrubberies, public walks and ways, belonging to the house; but not 50 or 60 acres of land which the deviser had kept in his hands with the house. And this construction was corroborated by the fact of the deviser having, in another devise, devised this property, "with the lands and grounds," showing that he had the distinction in view. Eyre, C. J., seemed to think that, if there had been nothing but this devise to show the intention, and they had found a house situated in a park, which had been always occupied with it, being as it were an integral part of the thing, it might have proved the intention of the testator to pass the whole together. See Cro. Jac. 121.

(e 1) *Copyholds to which I become entitled on the death of my father.*

DOE, D. RYALL, V. BELL. E. T. 1800. K. B. 8 T. R. 579.

Under a devise of "all the copyholds to which I became entitled on the death of my father," other copyholds which the father had surrendered to the deviser, do not pass.

A. B. being seised of two copyholds, called Reads and Greens, surrendered the former in 1774, and the latter, in 1777, to his son C. D. who, being also possessed of two other copyholds, in G. called M. and L., devised, "As to, for, and concerning, all my freehold, copyhold, and leasehold, estates, situate and which I became entitled to on the decease of my father," I give and devise the same to E. F. subject to an annuity of 100*l.* to W. H.; and I do further give to W. H. the mansion-house, fields, &c. at L., for life. The mansion-house and L. were part of the copyhold called Reads. The premises charged with the annuity were sufficient to pay it, without the copyholds Reads and Greens. The question was, whether the defendants were entitled, under the devise, to Reads and Greens. *Per Cur.* The testator, in devising the estates which he meant to give to the defendants, described them as the estates "to which he became entitled on the death of his father." Now, if we were to determine that they passed, we should disinherit the heir at law, not by positive words, or plain intention of the deviser, but by conjecture merely, and

* It was formerly held that lands mortgaged might be devised by the mortgagee, by the words "all my mortgages." But afterwards, the Court laid it down that these words would only comprehend mortgages for years, and not mortgages in fee, especially if they were forfeited; Cro. Car. 447; 1 Vern. 3; 2 id. 621; 1 Atk. 605; 2 Eq. Ca. Abr. 606.

† The words "all my lands out of settlements," as also the words "not by me formerly settled," will comprehend reversions in fee after estates tail; 3 Bro. P. C. 24.

by rejecting some important words in the will, would amount to an abandonment of two important rules; one is, that the heir at law is not to be disinherited; without positive words in the will, or a plain intention of the deviser that he shall be so, to be collected from the words of the will; the other is, that we must, if possible, give effect to all the words of the will, which we shall be doing by deciding in favour of the heir at law.

(f 1) *Estates, for the purchase whereof I have contracted.*

ST. JOHN V. ERRINGTON. H. T. 1774. K. B. Loft, 113. S. P. ST. JOHN V. THE BISHOP OF WINTON. T. T. 1774. K. B. Cowp. 94. S. P. EAST INDIA COMPANY V. SANDYS. Skin. 132.

The testator had a very large estate in divers other counties; but in the county of H. had nothing at all. He wished to make a purchase there for his wife. He afterwards, in consequence of this inclination, entered into articles for the purchase of an advowson. Under these circumstances, and having one advowson actually purchased, and the contract upon the other being executory, he made his will, and gave such property thus: "All my advowsons in the county of H., for the purchase whereof I have already contracted and agreed, to his wife." The question was, whether the purchased advowson, with that for which he had only contracted, passed.

The words "estates, for the purchase whereof I have contracted" were held on to carry purchased estates.

Lord Mansfield, on delivering the judgment of the Court, observed, that the testator considered a purchase as well passing under the expression of "contracted and agreed for;" every purchase was a contract and something more. The testator rightly considered every thing complete, but the mere form of conveyance. He took, therefore, no difference between a contract executory under such circumstances, and one executed. We cannot satisfy the intent, and should violate the words, if we did not take it as a devise to the wife of both advowsons.

(g 1) *Farm.**

(h 1) *Ground-rents.*

MAUNDY V. MAUNDY. T. T 8 G. 2. K. B. 2 Str. 1020.

In this case there was a devise of ground-rents on leases for years. The Court held, that not only the rent, but the reversion, passed.

The word, ground-rents, will carry a reversion.

(l 1) *House.†*

DOE, D. CLEMENTS, V. COLLINS. E. T. 1788. K. B. 2 T. R. 498.

A special case stated that the testator, who was a bargeman and boat-builder, being tenant for years of a house, garden, stables, and coal-pen, devised in these words: "To A. B. I give the house I live in, and garden, and all the household goods, as long as she lives, and that C. lives in, and the four tenements below the house I live in." The testator occupied the house in question, and the stables, and garden in front and to the east thereof; the stables and he used for his horses employed in the trade. There was a pig-stye at the corner of the stable and the whole was encompassed with a paling, except the coal-pen, which was on the other side of a road, near to the house. In this pen were kept, generally, about 50 chaldrons of coals, being the coals not sold out of the testator's barges: his own yearly consumption was not above three chaldrons, which were removed from thence in small quantities. The question was, whether the stables and coal-pen passed by this devise. It was contended they did not; and the distinction between a house and a messuage was recurred to.

[194]

Where a deviser, being possessed of a house, garden, stables, and coal-pen, occupied by him, devised, "I give the house I live in and garden to B.," the will was held to pass the stables and coal-pen.

Sed per Cur. The stables and coal-pen pass under this devise. As to the stables, it is very clear; they are within the very fence, which incloses the

* The word "farm" is construed according to its popular signification; 1 M. & S. 299; 1 Moore, 80; S. C. 7 Taunt. 348.

† In *Blackburn v. Edgley*; 1 P. Wms. 600; S. C. 2 Eq. Ca. Abr. 182. pl. 2. 313; pl. 20. 324; pl. 277. 60; pl. 5. 702; pl. 4. a devise of a house at C. was held to include land. Such construction rested, however, on the particular circumstances of the case; viz. that the profits of such lands had been used to be applied to the maintenance of the house, during the testator's life time; and, as that house was to be supported by the devisee in a similar way, and the same style of living observed, it was but fair to presume, that the two subjects should devolve upon the devisee together.

whole. And, as to the coal-pen, we think, from the general intention of the testator, it clearly passed.

2. *ROE, D. WALKER, v. WALKER.* E. T. 1803. C. P. 3 B. & P. 375.

Where a testator gave his wife "his house and goods, with all his lands, goods, and chattels whatsoever &c. for life; and, after death, to both or either of his two sons, who should then be under fifteen [195] years, until they should attain that age," and then devised "his aforesaid house, goods, and chattels equally amongst all his sons and daughters, share and share alike," it was holden that the latter clause did not pass the lands.

W. W. gave, devised, and bequeathed, to his wife, M. W., for life, certain property under the following description: viz. "my house, wherein I now dwell, with my goods that are in and about the same, with all my lands, goods, and chattels, whatsoever and wheresoever they be;" and, in event of his wife dying before his sons, H. W. and R. W. should attain the age of 15 years, he expressed his will, in reference to that contingency, as follows: "that my house, lands, goods, and chattels, that is to say, the rents arising from the same, shall be employed to the bringing of them up, until they come to the age of 15 years;" and concluded, "then, my mind and will is, that my aforesaid house, goods, and chattels, shall be equally divided amongst all my sons and daughters that be living at that time, share and share alike." Of the sons, H. W. and R. W., the former arrived at the age of 15, and the latter died in the life-time of the widow, on whose decease, the children of the testator, W. W., divided the lands, messuage, and premises, equally between them, and threw lots for their respective divisions, having full knowledge of the contents of the will, and continued to enjoy their several lots during their respective lives. On the death of R. W., the eldest son of W. W., his son, the lessor of the plaintiff brought the present action of ejectment against his brother, the possessor of one of the lots above-mentioned. On his trial, the plaintiff took a verdict; but it was reserved for the opinion of the Court, whether the latter clause in the devise would pass the real estate, or whether it must descend to the testator's grandson, the lessor of the plaintiff. It was urged in favour of the defence, that, though the testator had not expressed an intention to give the lands to his children in the same manner as he had bequeathed his personality, a strong argument arose, from the context of the limitations, that he wished all his property to follow the rule of descent he had pointed out; for the testator, after giving all he had to his wife for life, and providing for two of his children under a certain age, to the full extent of the same property, makes a general devise of all his property aforesaid among all his children; and that it was unreasonable to suppose that he would confer on all his children, comprehending his heir at law, a less estate than he gave for the education of his younger sons; that, though express words were necessary to impugn the heir's title, that rule generally obtained, in case of a devise to a stranger. On the whole that however inadequate the strict words might be to pass the lands, the intention that they should go as directed by the will was so manifest, that the Court might supply the words in aid of such intention.

Per Cur. The Court cannot rectify a mistake; till it is shown that an error exists. The utmost that can be drawn from this case is, a strong conjecture of the testator's intention; and, besides that, it would be unprecedented to supply words expressive of the subject-matter of a devise. There is not any ground for saying that the "lands" was meant to have been used.—*Postea* to the plaintiff.

(n 1) *Lands.**

(n 1) *Lands, tenements, and hereditaments.†*

(o 1) *Messuages.*

GULLIVER, D. JEFFREYS, v. POYNTY. M. T. 1771. C. P. 2 Bl. Rep. 726; S. C. 3 Wils. 141. S. P. *DOE, D. LEMPRIERE, v. MARTIN,* 2 Bl. Rep. 1148. S. P. *ONGLY v. CHAMBERS.* H. T. 1824. C. P. 8 Moore, 665.

Under a devise of messuages, &c. lands belonging to the messuages, were holden to pass.

In this case, there had been a devise of three messuages, with all houses, barns, stables, stalls, &c. that stood upon, or belonged to, the said messuages.

* The word "lands" includes, as well the surface of the ground, as every thing that is on, and under, it, as houses and other buildings, mines, &c.; Moore, 359. pl. 49; *Atcherley v. Vernon*, 10 Mod. 526. It will not, however, *proprio vigore*, comprehend incorporeal hereditaments, unless there is no other real estate to satisfy the words of the devise; Sty. 261; 2 Leon. 163. pl. 218; 2 And. 123.

† The words "lands, tenements, and hereditaments," will pass every species of pro-

The question was, whether two closes of meadow and six acres of arable land, [196] could pass under the above description. The Court held in the affirmative, it appearing that the same property had been previously conveyed by and under such terms of such devises.*

(p 1) *My part.*

DOE, D. PHILLIPS, v. PHILLIPS. H. T. 1786. K. B. 1 T. R. 105.

A case reserved stated, that the testator, being seised in fee in possession of, among other hereditaments, one moiety of three tenements, in the vill of H. which consisted of four tenements; and also of the reversion in fee, expectant upon the death of J. of the other moiety thereof; and being also seised of divers lands in B. leased on lives; and of other lands in possession, in B.; by his will devised thus; "All that my part, purpart, and portion of and in the tenement called H., and all other my lands in fee-simple, situate, lying, and being in B. *and the reversion and reversions, remainder and remainders, rents, issues and profits thereof*, I give and devise to N. P., his heirs, and assigns." The question was, whether the whole of the testator's estate in H., whether in possession or reversion, passed to N. P.? It was contended, that only the moiety of which the testator was seised in possession of the tenement in H. passed by this devise; and that the words *reversion and reversions, &c.* were referrible only to the subject of the last devise: namely, the lands in B. which were leased on lives. *Sed Per Cur.* The testator meant to give all the interest he had in H. whether in possession or reversion; and, with that view, he devised all his part, purpart, and portion of and in the tenement of H. So that here he used the word *tenement*, instead of *vill*. But the latter words are clearer. The *reversion and remainder, &c.* refer to that estate where he had a reversion.

(q 1) *Premises.*

DOE, D. BIDDULPH, v. MEAKIN. E. T. 1801. K. B. 1 East. 456.

A person devised as follows: "a messuage, or tenement, buildings, lands, or premises, *now in my own possession, and all other my real estate, whatsoever, in M. or in any other place,*" &c. to A. for life; and, after her decease, devised "the said messuage, or tenements, buildings, lands, and premises," to B. in fee. The question was; whether a reversion in fee of another messuage, to which the testator was entitled, after the determination of a life in being, in whose possession it was outstanding during his life-time, passed to the devisee in remainder? it being, on the one hand, urged that, as in the devise to B. the testator made use, not of general words of reference to what he had before given to A., but of the particular words descriptive of the property in his own possession, which he had first mentioned before the sweeping clause, he must be taken to have intended to confine the devise to that identical property, according to the maxim, that an heir at law shall not be disinherited, but by express words, or necessary implication. *Per Cur.* The word "premises," in the first clause, meant the several things before mentioned; and, according to the same sense in the last clause, it comprehends all that was then before described. See 3 P. Wms. 55. 61; Cowp. 360; Cro. Eliz. 674. 476.

(r 1) *Share, or portion.*†

And in *Rashleigh v. Muster*, 3 Bro. C. R. 99. it was determined, that money directed to be laid out in the purchase of lands, would pass by the words "lands, tenements, and hereditaments, whatsoever, and wheresoever."

* But in the case of *Hearn v. Allen*; Cro. Car. 57. two acres of arable land were holden not to pass under a devise of a messuage, *cum pertinentiis*. And when it is remembered that the Court decided the case abridged in the text, apparently on the ground that the terms of a previous deed were of some use in showing the meaning the deviser probably attached to the words he used; it is submitted, that it is much weakened as an authority, as such intrinsic evidence should not have been had recourse to, to extend the established signification of the words used.

† Thus where a testator devised a certain messuage and the furniture in it to A. for life, and after his decease he gave the said messuage and premises to B., the latter devise was held to carry the furniture as well as the messuage to B.; on the principle, that the word *premises* included all that went before; *Sanford v. Irby*; M. T. 1825; MSS. cited 2 Powell on Dev. by Jarman, 187.

‡ As to this latter word, *vide Doe, d. Phillips, v. Phillips*, abridged *ante*. p. 196.

DOE, D. STOPFORD, v. STOPFORD. M. T. 1804. K. B. 5 East, 501; S. C. 2 Smith's Rep. 92.

Where a testator gives leasehold and personal property to three sons, and 600*l.* to his daughter, and the respective survivors of the sons in case of decease before maturity were declared to be entitled to the share of his or her decease; the Court held that the word *share* was alike applicable to the [198] leasehold as the personal funds. A devise to the executor "of stock upon my farm," will carry standing crops from a devisee.

A. B. by his will, after devising to his three sons separately three leasehold estates; and to his daughter 600*l.* to be paid her at 21 years of age; and also; after devising the residue to his three sons, to be divided equally, share and share alike, at 21 years of age; and also, after directing that the produce of his real and personal estates should be applied towards the bringing up of his said children till of age; further directed that, if any of his said children should die under age, and without lawful issue, the share of his or her deceased should go equally amongst his surviving sons. The eldest died under 21, and without issue. The question raised was, whether the leasehold estate devised to him went equally to the two surviving sons. It was contended, that the meaning of the word *share* must be limited to the residue of the personal funds only, of which there was sufficient to satisfy it, according to its ordinary construction, and the sense it was used in, in the other parts of the will.

Sed per Cur. The share of the daughter (if she had died) could only have meant the entire share of 600*l.*; for she had no participation in what was given to the sons separately, or to the wife. It, therefore, the word *share* can only mean, with respect to daughter, her entire share, it is reasonable to give it the same meaning with respect to the son, unless something in the will, or some rule of law is contradicted thereby.

(s 1) *Stock upon farm.*

WEST v. MOORE. T. T. 1807. C. B. 8 East, 339.

Certain estates were devised to A.; and in a subsequent part of his will, he gave to his executors all his money, &c., *stock upon his farm*, with the implements of husbandry, and all other his personal estate, of what nature or kind soever, in trusts to pay debts and legacies, &c. It appeared, that there were assets sufficient to pay all the debts and legacies without the aid of certain standing crops growing there at the time of his death, with reference to which the opinion of the Court was now requested, as to whether they passed to the testator's devisee or executors. *Per Cur.* The only reason why standing crops shall pass from an executor to the devisee of the land, is, upon the presumption that it was the will of the testator that he who takes the land, should take the crops which belong to it. But the rule being founded on presumption, that may be rebutted by words which show an intention that the executor shall have it. Here, the devise of the land to the devisee is in general terms; but to the executors he devises by express words—*the stock on his farm, and all other his personal estate, of what nature or kind soever*. Besides, the devise to the executors is for the payment of debts, and therefore should have the largest interpretation to increase the fund; and the ultimate sufficiency of the fund, without this fund, will not vary the construction of the words. The executors are, therefore, entitled to the corn. See Co. Litt. 45. b.; 3 Atk. 16; Winch. 51; Cox v. Gudsalve, Holt's MSS. cited 6 East, 604. p.

(b) *Reference to tenure, or occupancy.*

(a 1) *Now in the tenure of.*

GOODTITLE, D. PAUL, v. PAUL. H. T. 1760, K. B. 2 Burr. 1089; S. C. 1 Bl. Rep. 255.

Lands at X. in the tenure of A. and B., comprise woods and timber excepted in the lease.

A. B. devised to his wife "his farm at Bovington, in the tenure and occupation of J. S., to hold to her and her heirs for ever;" and in like manner, recapitulated every estate he had, and devised them, one by one, to his wife and her heirs; and then generally devises to his wife and her heirs "all his freehold and copyhold lands above devised, with full power to sell, grant, give, or otherwise dispose of them, as if he himself was living." The farm at Bovington was a copyhold, under the rent of 3*l.* 6*s.* 2*d.* per annum; to which one H. was formerly admitted, who kept it in hand till 1719, when he devised the same to the said J. S., at a rack-rent "except all woods, underwoods, timber, &c. there growing (other than the lop and top of ancient pollards and the fruit of fruit trees,)" with liberty for the lessor to enter and take away the same. The woods consisted in large hedgerows, in chalk-dales (viz. old chalk-pits plan-

ted,) and in one wood-ground of six acres. In 1721, A. B. purchased the farm of H., subject to this lease, which he from time to time renewed. The heir brought ejectment for these woods, and the question, on a case reserved at the assizes, was, whether they passed by the will to C. D. the devisee, or descended to the son and heir at law. For the plaintiff it was contended, that the words "in the tenure, &c. of J. S." ought not to be rejected in prejudice of an heir at law; and that the testator, by being so particular in his description, intended no more should pass than was so described, and that the rest should descend to his heir. *See per Cur.* The words in question are not words of restriction, but of additional prescription. Had he meant them as restrictive, he would have said, all that part of my farm, or so much of my farm, as in the tenure, &c. the farm was an entire thing; it had gone together before he bought it; had been surrendered and granted all together under one quit-rent. And, as to the exception, the soil and herbage in the hedge-rows and chalk-dales was certainly not excepted. [199]

(b 1) Now in the occupation of.

1. GOODTITLE, D. RADFORD, v. SOUTHERN. E. T. 1813. K. B. 1 M. & S. 299. S. P. DOWN v. DOWN. H. T. 1817. C. P. 1 Moore, 80; S. C. 7 Taunt. 343. S. P. MARSHALL v. HOPKINS. E. T. 1812. K. B. 15 East, 300. S. P. HOLDFAST, D. HITCHCOCK, v. PARDOE. 2 Bl. Rep. 975.

C. D. devised all that his farm, called Troques-farm, then in the occupation of A. C. The question was, whether the devise was necessarily limited to the lands of Troques-farm, in the occupation of A. C., or might be shown, by evidence, to extend to other lands of Troques-farm, not in his occupation?

Per Cur. The defective description of the occupation will not alter the meaning of the devise, it being clear that the testator meant to pass all which was called Troques-farm, which is a plain and certain description.

2. DOE, D. PARKIN, v. PARKIN. H. T. 1814. C. P. Taunt. 321; S. C. 1 Marsh. 61.

A. B. devised all his messuages, tenements, lands, &c. situate in T., then in his own occupation, to B. for 500 years, upon certain trusts; after the determination of which term, and subject thereto, he devised all his said messuages, &c., so situate, to C.; and, in case of C.'s death, he devised the said last-mentioned hereditaments and trusts over. He also bequeathed to C. the stock, crops, &c., which at his death should be upon his said estate and premises, at T., then in his own occupation. The Court were clearly of opinion, that those premises only passed by the will, either to B. or D., which were in the testator's own occupation at the time of making his will. See 1 Bulst. 117; Cowp. 94; 3 Bro. P. C. 375. 2d edit.; 2 Bl. Rep. 930; Cro. Eliz. 113.

(c) Referring to locality, or other words of description.

1. DOE, D. BEACH, v. THE EARL OF JERSEY. E. T. 1818. K. B. 1 B. & A. 550; S. C. 3 B. & C. 870. S. P. ROE, D. CONOLLY, v. VERNON. E. T. 1804. K. B. 5 East, 51.

A testatrix, after reciting a power reserved to her by her settlement, on her marriage with G. V. P., devised, subject to the estate for life of her husband therein, all that her B. F. estate, with all the manors, advowsons, messuages, the building, lands, tenements, and hereditaments, thereto belonging, or of which the same consisted. In a subsequent part she added, "also I give my P. estate, which, as well as my B. F. estate, is situate, lying, and being in the counties of Glamorgan," &c. It appeared by the evidence, that the estate which had, for a half-century before the date of the will, gone by the name of the B. F. estate, comprehended several thousand acres, both in the counties of Glamorgan and Brecon; and part thereof consisted of the capital messuages, lands, and tenements, in the parish of B. F., comprising the whole of B. F. parish. That the estate comprised six advowsons, of which the parish of B. F. was one, and one manor, and individual sixth in another manor, and that there was no manor of B. F. One of the questions was, whether the evidence was admissible, there being a parish of that name. On a writ of error, in the

Where a person devises a farm by name, and describes it, to be in the occupation of A. B., the fact that particular closes, part of it, were not in his occupation, will not exclude those closes from the devise. But words of occupation have been in some cases held restrictive.*

[200]

* As where the reference to occupancy preceeded that of the name; Cro. Eliz. 674.

lands in the parish of B. F.* House of Lords, (3 B. & C. 870.) the question was put to the judges, whose answer was in favour of the reception of the evidence; but, on account of an imperfection in the special verdict, the House awarded a *venire de novo*.

See 2 Ves. & Bea. 187.

But the Court refused to admit evidence to show that under a devise of lands at S., [201] purchased of W., a certain parcel of the estate purchased of W., but which did not lie at S. was meant to pass.

2. DOZ, D. TYRRELL, v. LYFORD. H. T. 1816. K. B. 4 M. & S. 550.

T. T. was seised of a messuage and lands, in a parish and in two hamlets of the same parish, which he purchased of L. and let to a tenant at one entire rent. Other lands were afterwards allotted to him, under an inclosure act, in lieu of the said lands, except the messuage and two acres, which remained as before, all which the tenant continued to hold at the same rent as before. Subsequently he devised all his messuage, farms, lands, &c., situate in one of the two hamlets, by name, in the said parish, which he purchased of L. The question was, whether the evidence *dehors* the will was admissible to show that the testator intended to pass all the lands which he purchased of L., so as to include the lands in the other hamlet. *Per Cur.* The question as to the admissibility of the evidence turns on this: whether there is any latent ambiguity; for, if there be only a patent ambiguity, that is, one which appears upon the will itself, it must be determined on the will; and parol evidence cannot be admitted to explain it. Now, here no intrinsic matter has been brought forward to raise any ambiguity; for, in this case, the testator had property, to satisfy the entire description in the will. Besides, there is another rule, laid down by Lord Bacon (*Maxims of the Law*, 77.) that, if a man pass lands, describing them by particular references, all of which references are true, we cannot reject any one of them. And yet, if we were to hold, in this case, that lands out of S. passed, because they, together with those in G., were all purchased of L., we should act in defiance of this rule; for we should reject one part of the description. The evidence cannot, therefore, be admitted.

See 3 Taunt. 147; 3 M. & S. 171; 1 Bl. Rep. 60; T. R. 670; Dyer, 261. b.; et id. in notis; Cro. Eliz. 671; Cro. Jac. 22; 2 P. Wms. 140.

3. BODENHAM v. PRITCHARD. H. T. 1823. 1 B. & C. 350; S. C. 2 D. & R. 508.

A devise of "all my mansion house, called D., with the buildings and lands there to belong in, as now enjoyed by me, with all the appurtenances," was held to include certain closes belonging to an adjoining estate of the devisor, which he had taken into the estate called D., and occupied together with it.

Declaration in trover, for a number of timber trees, &c. Plea, General Issue. It appeared that J. P. of D. in the county of R. purchased the D. estate in 1772; and that in 1792 he purchased the Upper Hall estate, adjoining it; that he kept the whole of the D. estate in his possession; that he occupied with it three pieces from the Upper Hall estate, and had removed the hedges which separated them from the former estates; that two of those pieces were called the D. Meadows, and the whole in his occupation was commonly called the D. estate, after the latter purchase and change of occupation of the three fields; as before that time the remaining part of the Upper Hall estate was let on leases; that things being in that situation, J. P. made his will; that the will contained the following devise: "I give and devise all and every part of my real estates of which I shall die possessed, of every nature and kind whatsoever, with all and every their appurtenances thereunto belonging, unto F. B. and C. M. to hold to them, their heirs and assigns, to, and for the several uses, intents, and purposes hereafter limited, expressed and declared, of, and concerning the same. To the intent and purpose that the said F. B. and C. M. do permit and suffer my wife, E. P. to have, hold, and enjoy all and singular my mansion-house, in which I now live, called D. in the several parishes of Her-

* But, on the other hand, where (*Pullin v. Pullin*, 3 Bing. 47; see also *Wilson v. Mount*; 3 Ves. 191.) a testator, reciting that he was seised in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds in that manor, and all which lands, &c. were subject to a mortgage thereof made by him to S. R. (minutely referring to the mortgage) gave and devised all the said freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, not in mortgage to S. R. did not pass under this devise, but under a general residuary clause in a subsequent part of the will; the Court being of opinion that the testator intended to confine it to the property in mortgage to S. R.

It seems that a contrary construction would have left the residuary clause nothing to operate upon; but what weight this circumstance had with the Court does not appear. The testator's expressions certainly indicated that they considered the mortgage as extending over the whole subject devised; 2 Powell on Dev. by Jarman, 195.

sop and Llanguallo, in the said county of Radnor, together with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances, for and during the term of her natural life; and from and after her decease, then I give and devise all my said mansion-house, called D. with the lands thereto belonging, with the appurtenances, unto my godson, J. S. B., and his heirs and assigns for ever; and as to all the rest of my said real estates which I may die possessed of, I give and devise the same, and every part thereof, unto my said wife, E. P. her heirs and assigns for ever; she, my said wife paying and discharging all the same annuities or yearly rent-charges out of the same; and also she, my said wife, paying and discharging all the several legacies hereinafter in this my will mentioned, out of the said estates, if my personal estates should prove insufficient." It also appeared that the plaintiff was the devisee of J. S. B. and that the defendant was the widow of the said J. P. and that the question between them was, whether the three fields which formerly belonged to the Upper Hall estate could be considered as part of the D. estate when the testator died; for the defendant had cut down some of the timber on these fields. *Per Cur.* We are of opinion that the plaintiff ought to recover the value of this timber. In questions of this nature, if a will give two ways of construction, it is not necessary that both should be applicable to the question before us; if one be applicable, and the intention be correspondent with it, we need not look farther. The words "as now enjoyed by me," furnish a medium of construction with which the intention of the testator clearly agrees. The words "thereunto belonging," may, in their popular sense, include all that was united in occupation, although not connected in title with the old D. estate. He has not said "my D. estate" nor "my D. lands;" but he has been more particular, and said, "my mansion-house, called D. together with all lands thereunto belonging, as enjoyed by me;" clearly showing, that what he enjoyed in his actual possession, should pass to his wife, and then to the plaintiff, who would take a fee in all that was given to the widow for life; and is, therefore, entitled to the value of all the timber felled by the tenant for life. The whole case then reduces itself into this simple statement. The testator was owner, in fee, of two estates, D. and Upper Hall. He lived at D. afterwards he purchased the Upper Hall estate, which is contiguous to the D. mansion-house. He opened a gate into the garden from one of the fields of Upper Hall, and he removed some of the fences, so as to lay several fields, formerly occupied with the Upper Hall estate, open to the D. one, and occupied them himself until the time of his death. During his life, he devised to his wife all and singular his mansion-house in which he then lived, called D., together with all the buildings and lands thereunto belonging; which perhaps would have passed for nothing more, than those lands which were connected in title with the mansion-house; but he says further, "as now enjoyed by me." The fair import of that sentence is, that the widow should have for her life, all that had been used in enjoyment by the testator himself. The testator must have considered these fields as making part of the D. estate, and hence, the plaintiff is entitled to the timber. [102]

4. *DIE, D. BROWN, v. BROWN.* T. T. 1809. K. B. 11 East, 441. In the construction of these cases, it may be observed that the general rule is, that parol evidence is inadmissible to include other property where the description is satisfied: Ejectment for a close of freehold land, called P. at North Collingham, in the county of N. The question now before the Court arose on the will of one A. B. whether such close passed by the devise in that will of all the testator's copyhold estates in North and South Collingham to his nephews, T. B. and W. D.: if it did; the defendant had no title; if it did not pass by such devise; it descended to the lessors of the plaintiffs, who were his heirs at law. A. B. it appeared, devised to his wife all his wines, &c. for house-keeping, in addition to the settlement, he had made upon her upon his copyhold estate; and to his niece M. the rents and profits of his new-inclosed freehold cow-pasture close, in North Collingham, during the life of his wife; and then to T. B. and W. B. two nephews, all his personal estate to be divided amongst certain nephews and nieces, and their sons and daughters; and after the decease of his wife, he devised the same two nephews all his furniture, plate, &c. and "all his

copyhold estates in North and South Collingham;" and allotted his *personal estate* to sell and divide amongst his nephews and nieces, &c. including T. B. who, he declared, should be an equal sharer in this division of his *real and personal estate*. Evidence was brought forward, to show, that the settlement on his wife included a certain *freehold close*, mistakenly there enumerated as one of several *copyhold closes* settled, and which was, in fact, intermingled with the copyholds; (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement) for the purpose of showing, that by the devise "of all his *copyhold estates* in North and South Collingham," after his wife's decease, in trust to be divided, &c. the *freehold close* in question passed; as meant to include all his *real estate in settlement* upon his wife, and which settlement was referred to in the first devise to the wife. Besides the settlement, other instruments and papers, not referred to, were produced; viz. a bond of the same date with the settlement, and in aid of it, speaking only of *copyhold* to be settled; the rough draught of the settlement, altered by the testator; a book indorsed, *Collingham's Estate and Survey*, kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and, lastly, a rental kept in the same place, on which was indorsed by the testator, "that all the rents of the copyhold lands in North and South Collingham, &c. were settled on his wife for life." A verdict was found for the defendant, subject to the opinion of the Court, who now said the *postea* must be delivered to the plaintiff, as there was no ambiguity on the face of the will; the testator having *copyhold estates* in North and South Collingham to answer the descriptions in it; nor was there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife, and there was no necessary connexion. Nor did it follow that the testator meant to devise the same premises, under the name of copyhold, to the trustees, as were settled on his wife; or that he was under the same mistake that the close in question was *copyhold* when he made his will, as when he made the settlement or indorsed his rental; and that therefore there was nothing appearing on the will to warrant a construction of the word *copyhold*, so contrary to its ordinary acceptation, as to include the *freehold* in question.

See 5 East, 57; 7 id. 299; 1 P. Wms. 286; 9 East, 366; 2 Atk. 450; 3 Vcs. jun. 522, 530; 6 Ves. jun. 400.

[204] 5. WHITBREAD v. MAY. M. T. 1801. C. P. 2 B. & P. 593.

For, altho' this doctrine has been at times doubted;

A. devised his "estate at Lushill, in the county of Wilts, and Hearne and Buckland, in the county of Kent," to his son in fee. At the time of the devise, A. had lands in the parish of Hearne, and also in the several parishes of C., W. S. R. and S. all which he purchased by one contract from one person, and used to call his "Hearne Estate," or "Hearne-Bog-Estates." The estates at Lushill, in Wilts, and also a farm called Buckland Farm, in Kent, were sold before the testator's death; and at the time of his death he had no estates in Kent, except that which lay in the parishes of Hearne, C. W. S. R. and S. The Court were divided in opinion, as to whether the above facts were admissible in evidence to show that the testator intended to pass the land in the several parishes of C., W., S., R. and S., as well as that in the parish of Hearne, and accordingly gave judgment *pro forma* for the plaintiff.

6. DOE, D. CHICHESTER, v. OXENDEN. T. T. 1810. C. P. 3 Taunt. 147.

Judgment affirmed Dom. Proc. 4 Dow, 65.

It is now confirmed by a decision of the House of Lords.

A testator devised his estate at Ashton. It appeared that he had a maternal estate, comprehending a manor and capital farm and lands in the parish of Ashton, as well as several other estates; some in the adjacent parishes, some ten and fifteen miles distant. Evidence was attempted to be brought forward to show that he was accustomed to call all his maternal estates, his Ashton estate, to raise the inference, that he meant to devise the whole by that name. The Court held, that the premises in the manor or parish of Ashton only passed; observing, that this would give the will an effective operation, in which

the case differed from all others in which such evidence had been received; for in them, without it, the devise would have had no operation; whereas here there was an estate sufficient to satisfy a devise, accruing to one meaning of the description of the premises. See *Bac. Abr.* 23; *And.* 58; *Ambl.* 175; *Godb.* 16; 2 *T. R.* 498; 3 *Ves.* 516; 7 *East*, 299; 6 *Ves.* 322, 400.

7. *DOE, D. BROWN, v. GREENING.* M. T. 1814. K. B. 3 M. & S. 171.

The testator in this case, by his will, devised all the estate and interest whatsoever which he had or could claim, either in possession or reversion, of and in any lands or tenements or hereditaments at C. Evidence was attempted to be adduced to show, that another estate, near, but not at C. was formerly united and had been ever since enjoyed with the estates at C., in order to show that it passed under the devise. The Court said, that in the absence of authority they would not permit it to be agitated, that a word denoting a local description, and not a general description, could have a different sense given to it by the admission of evidence.

8. *DOE, D. DELL, v. PIGOTT.* T. T. 1817. C. P. 1 Moore, 274; S. C.

7. Taunt. 557.

A devise was as follows: "I devise all my freehold and copyhold estates, situated in or near Latchingdon, near Maldon; and also all and singular my freehold and copyhold estates at or near P. in the same county, which last-mentioned estates, are now, or lately were, in the occupation of L. P. and G. H." The testatrix had a freehold close in the parish of St. Peter's, Maldon, near to a principal street of Maldon, distant from three and a half, to six and a half miles from her principal estate at Latchingdon, and intercepted from it by parts of three parishes. She had a freehold close in Steeple, distant two and a half miles from Latchingdon, and nine miles from Maldon. She had copyhold lands in Latchingdon; and the will of an ancestor spoke of lands, both freehold and copyhold, in Latchingdon. The Court held, that the freehold close in St. Peter's, Maldon, did not pass by this devise.

9. *ROE, D. GILLARD v. GILLARD.* E. T. 1822. K. B. 5 B. & A. 785; S. C.

1 D. & R. 464.

A. at the time of making his will, was seised in fee of certain freehold and leasehold premises, and, amongst the rest, of a dwelling-house, which he inhabited in the parish of D. and six acres of land, situate in the parish of S., a mile distant from the village of B. and 70 acres of leasehold land, in and near the village of B. and 58 acres of freehold land, and some leasehold land, in the parish of W. A., at the time of making his will, resided in the dwelling-house, and had in his own occupation, all the land in the parish of W. the freehold lands in the parish of S. and leasehold lands near the village of B.; but the freehold lands, in the parish of D., were in the occupation of tenants. Before the making of the will, A. had contracted to sell all the lands in the parish of S. and the leaseholds near the village of B. The amount of his debts, at the time of his death, exceeded his personal property. A. shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses, to be paid; with the due payment whereof I charge my real estates. I give to my nephew, T. G., 700*l.*, to be paid by my executors; and to my nephew, J. G. (the heir at law), 20*l.*, to be paid by my executors; and, lastly, I constitute R. G. my sole executor of all my lands for ever, and all my leasehold property here or at B., or money that shall become due for the same, by paying certain annuities thereout by half-yearly payments.

The Court held, that, by this will, the executors took a fee in the freehold lands, in the parish of W., and made use of such remarks as follows: We are perfectly satisfied that the testator intended that his executors should take all his freehold property. The testator's debts could not, it has been found, be met by his personal property; accordingly, he has charged his real estates. This, however, would not have led to any conclusion against the heir; but he has done worse; for he has directed that legacies should be paid by his executors. In the conclusion also of the will, where the testator makes a gift to the executors he charges it with annuities. This gift is clearly applicable to

And on this principle; parol evidence was refused, to show, that in a devise of property at C., the testator meant to include property near

[205] So, it has been held that a devise of estates, "situate in or near L., near M.," did not include a close which was situate four or six miles from L., and in the town of M.

And, as a general rule it may be added; that in all such cases, where there are two expressions used disjunctively, and one is complete and perfect in itself, it must be taken by itself, and need not be qualified, altered, or restrained, by any other words whatsoever.

some part of the freehold. The question is, whether it includes the freehold at W.; and we think it does. It has been contended that effect may be given to it; 1st, by considering the words "here or at" as relating only to the leasehold property; or, 2dly, by considering those words as descriptive of all the testator's property, both freehold and leasehold. The latter construction will obviate every difficulty that may otherwise arise in the construction of this will, as it will exclude all beneficial interest, not of the heir only, but also of the next of kin, and give the whole property of both kinds to the executor, for his own benefit, subject only to the charges mentioned in the will, and prevent an intestacy as to any interest, legal or equitable, either direct, or resulting from the operation of law. There appears to us, however, to be a greater difficulty in the second construction than in the first. It is easier to construe the word "here," as descriptive of the freehold at W., under the peculiar circumstances of its situation and occupation than to construe the words "at B." as descriptive of the freehold in S. For these reasons, we are of opinion that the words of description "here or at B.," whatever be their meaning, are to be confined to the last antecedent, viz. "my leasehold property," and are not to be extended to the more remote antecedent "my lands for ever;" for the gift, these words contain, does not require any other words to give effect to it, for the purpose of directing either the thing given or the intended donee, and may therefore, in furtherance of the manifest intention, be taken by itself, not qualified or restrained by the words that afterwards occur. See Noy, 48; Prec. in Ch. 471.

Where the intention of the testator seemed to be, to pass customary freeholds, under the term copy hold, the Court gave effect to it.

(5) *As to customary freeholds.*

DOZ, D. COOK, v. DANVERS. H. T. 1806. K. B. 7 East, 299; S. C. 3 Smith's Rep 291.

A. B., possessed of a customary estate, parcel of the manor of S, held of the lord of the manor, according to the custom of the manor, demisable by copy of court-roll, to which she was admitted on payment of a fine, saving the right of the lord, and which she surrendered to such use as should be declared by her will in writing, and of which she had granted a lease for forty-one years, upon licence by the lord; devised the same by the description of all that copyhold messuage at S., to M. C. On the question of, whether such property passed under the description given of it in the will, the Court said: the estate described is called all her copyhold, and it is not contended that she had any other estate to which it could apply; and supposing it to be a misdescription, there cannot be a doubt, if by such description she meant that estate, it could pass.

[207]

4th. *With reference to the quality of the estate conveyed.*

1. *Fee-simple.* (a) *General rule.*

1. MINSHULL v. HILL. E. T. 1814. K. B. 2 M. & S. 608. S. P. OATES, D. MARKHAM v. COOKE. 3 Burr. 1684. S. C. 1 Bl. Rep. 593. S. P. ARMNER'S CASE. Lofft. 95. S. P. DOE, D. BURVILLE, v. BURVILLE. Lofft. 100. S. P. GRUMBLE v. JONES. 11 Mod. 207. S. P. BLAND v. BLAND. 9 Mod. 478. S. P. DAVIS, D. TULLY, v. HAWLIN. Willes, 612. S. P. ANON. Carter, 232. S. P. DIGHTON v. TOMLINSON. Com. 194. S. P. PRESTON v. FUNNELL. 7 Mod. 296; S. C. Willes, 164.

An estate of inheritance may pass by a will, if such appears to be testator's intention.*

In this case there was a devise to the use of J. C., the testator's brother, for life; and from and after his decease to his first and other sons, according to their seniority of age and priority of birth; and if J. C. should die without such issue, and before they arrived at twenty-one, then to the use of J. M. (eldest son of T. M., his brother-in-law) and his son or sons limited as aforesaid; and if J. M. should die, leaving no son or sons as aforesaid, then to K. M., second son of T. M. and his son or sons limited as aforesaid; and if the said K. M.

* Thus it was resolved, that a devise to a man in *perpetuum*, gave him an estate in fee; Br. Ab. Devise. pl. 33; 1 Inst. 9. b. So of a devise to a man and his successors; 1 Rep. 85. b. It is said by Perkins, see 557. that if lands be devised to J. S. to hold to him and his assigns, he will take an estate in fee simple, but this is denied by Lord Coke; 1 Inst. 9. b. Lord Coke also says, a devise to A; *et sanguini suo*, passes a fee, for the blood runs through the collateral as well as the lineal line; but a devise to a man, *et semini suo*, only gives him an estate tail; 1 Inst. 9. b.

should die, leaving no son or sons in the manner aforesaid, then to the use of his neice A. M., her heirs and assigns for ever. The Court held that J. C. having died without issue, J. M. (the eldest son of T. M.) took an estate for life, and W. C. M. (his only son, who had attained twenty one) took a vested indefeasible remainder in fee. See 2 Saund. 388; 9 East, 400; Willes, 138; Cro. Jac. 590; 3 T. R. 143; 6 id. 512; 7 id. 589.

2. *DOE, D. JAMES, v. AVIS.* E. T. 1792. K. B. 4 T. R. 605.

A special case stated, that A. being seised in tail of an undivided fourth part of an estate, and entitled to the reversions in fee of two other fourths thereof, expectant on the determination of estates tail in other persons; by her will, after reciting that she was entitled to one undivided fourth part of the estate in question, devised her said fourth part, share, or interest, of or in the said estate, to B. in fee, upon certain trusts for the benefit of her mother, her son, and C. and D. her two daughters. A. then directed all the residue and remainder of her estate and effects to be sold, as soon as might be after her death, and her funeral to be paid thereout, and the overplus, if any, to be divided between her said two daughters. The Court were of opinion, that although the general words in the residuary clause were in themselves sufficient to pass a fee, yet in this case the remainder expectant on the estate tail did not pass by them, it not appearing to be in the contemplation of the testatrix when she made her will, and it being also probable from the purpose to which a part of the produce was to be applied, namely, the payment of funeral expenses, that she only meant to give something which could be disposed of immediately.

Which intention it is, in all such cases, the primary object of the Court to satisfy.

[208]

3. *DOE, D. CRUTCHFIELD, v. PEARCE.* E. T. 1815. Ex. 1 Price, 353. S. P. *GOODRIGHT, D. PARRACK, v. PATCH.* Loft. 224. S. P. *OATES v. BRYDON.* 3 Burr. 1895.

This case came before the Court on an ejectment brought by an heir at law, that is, by the devisees of that heir, against the devisee of the person to whom the original testator had devised an estate in the premises in question. The devise was "I do give and dispose of all my wordly goods it hath pleased God to bless me with" as follows: "I give to my son T. the manor of F., and all my lands in that parish." And "I do give to my son R. the perpetual advowson of *Husbands Bowerth*, in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northampton*." At the trial it was insisted on the part of the heir that he was entitled as heir at law to all the testator's real property, not expressly or by necessary implication devised away from him. On the other side, it was contended that a manifest intention was apparent on the face of this will, on the part of the testator, to give to R. a fee in the estates in *Northamptonshire*.

Provided there are words of inheritance or perpetuity:

Per Cur. It is not necessary for us to decide what estate R. took in the advowson. The real question now is, whether the devisee R. took an estate in those lands in *Northamptonshire* for life, or in fee? In this case it was argued, that the introductory words manifested an intention to give a fee; but there are many cases where introductory words, full as strong as these, have been construed not to extend to carry a fee, and so it has been often decided. In the case of *Right v. Sidebotham* Doug. 759. the testator sets out with giving and disposing of all his worldly goods and estate, which makes it a stronger case than the present. Then he gives to his sister S. 1s. and to her son 1s. He then gives to his wife S. S. all the rest of his goods and chattels, and personal estate whatsoever. "Also, I give and devise to S. S. my said wife, her heirs and assigns for ever, all my lands lying in the parish of B. And I give and bequeath to my wife aforesaid all my lands, tenements, and houses lying in the parish of C. N." The Court held, she only took an estate for life, although comprised in the same sentence in which he had given her the previous estate in fee, and that for want of the words of limitation being repeated. On the whole, the best view of this case seems to be, that we should not be warranted in giving a fee to R. in the testator's lands in *Northamptonshire*, for want of words of inheritance or perpetuity.

And in the case of chattels real, n

4. *EYRES v. FAULKLAND.* H. T. 1697. K. B. 1 Salk. 231.

A., being possessed of a term for 99 years, devised it to B. for life, and so

to him the specific power of charging the estate with legacies. We think, therefore that W. F. under the will, took an estate in fee, with an executory devise over (in the event of his dying, having no issue living at his death,) to such person as should in that event be the heir-at-law of the testator.

See 3 Ves. jun. 332. 492; 5 Ves. jun. 399; 2 Saund. 380; 12 East, 589; Willes, 1; 1 Atk. 432; 2 Bl. 736. Cowp. 420; 3 T. R. 143; 7 id. 589.

It having been already seen, that the word *or*, or such like expressions will be construed *and*, to effectuate the object the testator had in view;

And that the grammatical construction of a will will only prevail, where it can be allowed to do so, consistently with the testator's evident wish;

11. DEWE, D. WILKINS, v. KEMEYS. E. T. 1808. K. B. 9 East, 366.

Property was devised to A. for life; remainder to B. and his heirs; but if B. died before A. or if she died without heirs of her body, then to C. and his heirs, &c. B. survived A. and afterwards died without issue. The question was, whether the remainder over took effect. The Court decided in the negative; holding that the devise over to C. after B. could only take effect if B. died before A. and without issue; for that unless *or*, were read as *and*, the devise over would take effect if B. died before A. although B. left issue, which would clearly be against the apparent intent of the devisor, which was to prefer the issue of B. to C.

12. RIGHT, D. HURD, v. SAUNDEBS. H. T. 1803. K. B. 1 Smith's Rep. 136.

A testator expressed his intention of disposing of his estate, real and personal, and devised freehold estates at A. to E. S.; and to M. S. a manor and farm at L. and lands and premises at S. and at S. G. "which two last were freehold," charged with several annuities. The estate at L. was leasehold for lives; and in order that the lives of the estate at L. might be kept duly filled up, he gave 400*l.* for the purpose of renewing on his decease; and directed that if any life should drop during the life of the annuitants, then if H., son-in-law to M. S. would renew, he should have the full moiety of the said estate, and the remaining moiety after the decease of M. S. to be divided between her sons and daughters; and if H. did not fill up the life; either of them who should renew, should have the full moiety of the said estate, after the annuities charged upon it were paid; and if neither renewed, then the lands and hereditaments at S., and the lands and hereditaments at S. G. to be sold, and a renewal made with the purchase money; and if the said M. S. and H., or whoever should be in possession of the said estate, should pay 400*l.* to A. W. the annuity chargeable to him of 25*l.* (one of those charged on the freehold also) should cease. From the observations of the Court, the construction, put on the terms of the will, will be apparent. They said: we have had some difficulty in the course of the argument as to the proper construction of this will; without however, violating the general sense of the words used, we cannot say that the moiety of the S. estate was intended to go to H. We feel indeed, considerable difficulty, for we fear the intention of the testator was *otherwise*. Here he uses the word *estate* in the singular number, and he does so in the beginning of the will, when he proposes to devise *all* his real and personal estate, but that would weigh little. By the words, *full moiety of the said estate*, it is doubtful whether he means only the moiety of L. estate; for, if the renewal was not made, it was to go to the sons and daughters of M. S. "they renewing to have the full moiety after the said annuities above charged shall be paid;" and these were charged upon the freehold also; but they were to have *one* moiety, share and share alike, without renewing; and he meant to give to the sons and daughters of M. S. all which he meant to give to M. We are not however, inclined to say, that if he meant to give more than the leasehold, he has used sufficient words to convey that intention, and if a testator does not use words to express his meaning, the estate must go to his heir at law. See Doug. 730; 3 Burr. 1533; Cowp. 661, 2.

For, where reading certain words in a will in their natural order would totally nullify the intention of the

13. DOE, D. ANNANDALE, v. BRAZER. H. T. 1821. K. B. 5 B. & A. 64.

A testator by his will bequeathed the rents of one dwelling-house situate in A. to C. B. for his life, and from and after the decease of the said C. B., he bequeathed the same rents, *together with* the rents of all his other houses and lands unto his nephew and niece therein mentioned, for their lives, and the life of the survivor; and after the decease of the survivors of them, he gave and devised all his houses and lands to trustees, in trust to sell the same, and to

pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estates to C. B. It was contended that no interest passed to the nephews and niece of the testator by the will, until after the death of C. B. *Sed per Cur.* The proper way of reading the will is this: "I give to C. B. that house, and after his decease I give and bequeath the rents, issues, and profits of that house to my three nephews and niece, together with the rents, issues, and profits of my other houses," applying the words, *together with*, as a repetition of the words of gift and bequest. The testator did not mean to postpone the interest in the other houses till after the decease of C. B. but to give to him the immediate interest in that house. See 1 Saund. 181.

(b) *Effect of appointment of trustees of inheritance.*

TRENT V. HAY. H. T. 1806. K. B. 7 East, 96; S. C. 3 Smith's Rep. 69, *semb. overruling*; S. C. M. T. 1804. C. P. 1 N. R. 116.

A testator having an estate settled on himself for life, remainder in trust to secure 500*l.* a year to his wife, in lieu of dower; remainder to trustees for 200 years, for the better securing of the annuity; remainder to himself in fee; gave 200*l.* per annum to his wife, in addition to her jointure, his just debts being previously paid; and appoint A., B., and C., as trustees of inheritance for the execution thereof. The Court, on a case sent by the Lord Chancellor, that is three judges, viz. Ellenborough, C. J., Grose, J., and Le Blanc, J., were of opinion that A., B., C., took an estate in fee, in remainder, in the said real estates of the testator, subject to the term of 200 years, considering that the words *trustees of inheritance* meant *trustees to inherit his estates* for the execution of his will. But Lawrence, J. said: the rule of law being, that the intent of a testator to disinherit his heir at law must be clear, and appear plainly in his will, otherwise his heir shall not be disinherited, the question for the opinion of the Court will depend upon this, viz. whether such intent doth so appear? and I do not think that it does; for the testator has not made any mention of his lands nor has he in any manner referred to them: the addition to his wife's jointure is not charged upon them; and that part of his will may be well satisfied, if his personal estates be the fund for paying it. The giving his wife 200*l.* a year in addition to her jointure, is but the giving that sum over and above the jointure, and it will not be the less an addition to it, if it be payable from a different fund. The principal ground on which it has been contended, that the testator devised his lands for the payment of it, is furnished by that part of the will which appoints certain persons to be trustees of inheritance for the execution thereof, which expression, though it may furnish ground to conjecture that the testator meant that they should take his real estate, to enable them to execute his will, is, in my opinion, too uncertain to have such effect as was contended for. The use of any expression, made so inaccurately as it cannot but be admitted this has been, without any circumstance to fix and mark its sense and meaning, and that, by a person so ignorant of legal forms, as the testator appears to have been, will not, I think, authorize the Court to say, that it must be understood with reference to his real estates. The word *inheritance* may have been supposed by him to have been more generally applicable to things in personal than it is when properly used; or that the mode in which things real and personal are transmitted to those who, as the representatives of their owners, are entitled to them on their deaths, was an acquisition by inheritance as much in the one case as in the other; or he might suppose that things personal would descend to an heir; or he might mean, by the expression he has used to point out those whom he meant to succeed to the trusts of his will, on the deaths of the persons he had named, and that in their heirs those funds should be vested, which, without charging his real estate, would be attainable to satisfy the bequests to his wife, &c. And I think it will be going much beyond any of the cases which are to be found in our books, to hold that this will in any way affects the real estates of the testator. I am therefore of opinion, that A. B. and C. did not take any estate or interest in the real estates of the said testator, under and by virtue of his will; and that they had not, by virtue of his

will, a power to make any conveyance or appointment of any estate or interest of or in such real estates. See 4 Ves. 491; Style, 301; Sid. 75; 2 Str. 798; 3 Burr. 1604; 5 id. 2608; 1 P. Wms. 472; 2 id. 309; Hob. 21; 5 Ves. jun. 445; 1 Anderson, 145; 1 Vent. 338; 1 Ch. Ca. 35; Hard. 204; 1 Lev. 304; Vaughan, 262.

(c) *Effect of particular expressions.*

(a 1) *All my freehold and leasehold estates.**

(b 1) *All my real property.†*

(c 1) *All the rest and residue of my estate.*

[215]

SHAW V. BULL. M. T. 1701. K. B. 12 Mod. 596. S. P. TANNER V. WISE.

3 P. Wms. 295. S. P. CLIFFE V. GIBBONS. M. T. 1715. K. B. 2 Ld.

RAYM. 1324. S. P. CARPENTER V. CHAPMAN. 9 Mod. 92.

Per Trevor, C. J. In the construction of wills generally, the words, my estate, the residue of my estate, or the overplus of my estate, may well pass an inheritance, where the intent is apparent to pass it. But such an intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will, and circumstances of the case; for, if the words be indifferent to real and personal estate, or may be applied to personal alone, then the heir at law is not to be disinherited by the implication of such words, or by any implication at all, but when it is a necessary one.

(c 1) *Estate.*

1. RANDALL V. TUCHIN. M. T. 1815. C. P. 6 Taunt. 410; S. C. 2 Marsh. 113. S. P. LANE V. HAWKINS. M. T. 1683. K. B. 2 Show. 388. S. P. BRIDGEWATER V. BOLTON. H. T. 1703. K. B. 1 Salk. 236. S. P. BARRY V. EDGEWORTH. E. T. 1729. K. B. 2 L. Wms. 523. S. P. CHICHESTER V. CHICHESTER. M. T. 1811. C. P. 4 Taunt. 176. S. P. WILSON V. ROBINSON. 2 Lev. 91. S. C. 3 Keb. 180; 1 Mod. 100. S. P. REAVES V. WINNINGTON. T. T. 1684. K. B. 3 id. 45. S. P. HYLEY V. HYLEY. id. 228. S. P. MOOR V. PRICE. T. T. 1672. K. B. 3 Keb. 49. S. P. CARTER V. HORNER. E. T. 1692. K. B. 4 Mod. 89; S. C. 1 Show. 349. S. P. SHAW V. Bull. M. T. 1701. K. B. 12 Mod. 594. S. P. CLIFFE V. GIBBONS. M. T. 1715. K. B. 2 Ld. Raym. 1324. S. P. STYLES D. RAYNENT. V. WALFORD. 2 Bl. Rep. 938. S. P. DOE, D. MORRIS V. UNDERDOWN. M. T. 1741. C. P. Willes, 296. S. P. CARTER V. HORNER. 4 Mod. 90.

The word "estate" passes a fee simple. By a will devising lands, the testator gave to his niece a number of testaments, describing particularly the situation, abutments, and the tenants of such, and then added, "all which said estate, being copyhold, and held of the manor of K., I devise to my said niece, for life, and then to her son B." The testator then directed that, as long as one of his tenants should choose to occupy one of the houses devised, he should not be charged more than his present rent. He then bequeathed to a man and his wife, and the survivors, 5s. a week, to be paid weekly, out of the estates devised.

The court held, that B. took an estate in fee; and, in adverting to the arguments of the counsel who had argued the case, said: It is admitted, very properly, that the word *estate*, or *estates*, will carry a fee, unless the other parts of the will restrain the effect of it. Formerly, a narrower construction prevailed; and, it was held that, if the word "estate" were attended by words designating the thing devised, or its situation, it was to be considered, not as descriptive of the interest intended to be passed, but only of the lands themselves, which were the subject of the devise. Latterly, however, a more liberal construction has been adopted; and the word "estate," though it be followed by words which point at the situation, or at the particular house or land, has been held to convey a fee simple. It may be restrained. It may be shown by other parts of the will, that the testator has used the word "estate" as descriptive only of the thing devised, and not of the interest meant to be

[216]

* Devise of "all my freehold and leasehold estates," carries a fee; Doe, d. Davy, v. Burnsall, 6 T. R. 24.

† These words have been considered as sufficient to carry an estate in fee simple; 18 Ves 193.

conveyed; but then it lies on the party who contends for this narrow construction, to show that there are such words of restraint in the will. It has been argued, that such words of restraint are here to be found, in the former branch of the devise, to which the latter branch refers. That the testator, having first enumerated the several messuages, lands, &c., to be devised, afterwards devises them by the description of "the said copyhold estates," and that the words "said copyhold estates" can carry no larger meaning than the words "messuages, lands, &c.," to which they refer, and that both are plainly used in the same sense. To this, it has been answered, and we think satisfactorily, that the testator's only reason for enumerating the different parts of his copyhold property was, that he meant to devise them to different persons; that no such enumeration is found in the devise of his freehold property, the whole of which is given to one person, by the general description of "all my freehold estate;" that the copyholds are first particularly described, on account of the different portions into which they are to be divided; but that, when he comes to the clause in which he bequeaths them to his niece for life, and then to her son, he deserts the former description, and uses the word "estates." This accounts for his having first enumerated the different copyholds, and does not take from the legal effect of the word "estates," by which he devises them, nor gives it a narrower construction than the law in general assigns to it.

It is the most general word that can be used; for, so far from its being necessary to add words of inheritance, to make it pass a fee, words of restraint must be added, to make it pass a less estate. This word will not be restrained by a reference to local position; [217]

2. *ROE, D. URRY, v. HARVEY.* T. T. 1770. K. B. 5 Burr. 2638. S. P. *HOLDFAST, D. COWPER, v. MARTEN.* M. T. 1786. K. B. 1 T. R. 411. S. P. *FLETCHER v. SMITON.* M. T. 1788. K. B. 2 id. 656.

A person devised all the rest and residue of his estate, whatsoever, and wheresoever, to his wife. It was contended that the word "estate" did not necessarily mean real estate. But Lord Mansfield answered, that the word "estate" carried every thing, unless tied down by particular expressions.

3. *HOLDFAST v. MARTEN.* M. T. 1786. K. B. 1 T. R. 411.

By will, testator gave and bequeathed to A. his estate, at B.; and, after giving several legacies, added, "after these legacies, I give and bequeath all the rest of my effects, furniture, estates, real and personal, to C." The testator died, leaving a small freehold estate not mentioned in his will. It was contended that A. took only an estate for life in the estate devised to her, the words of locality annexed to the gift of the estate rendering it a description of the thing given, and not of the testator's interest therein.

Sed per Cur. A. takes a fee. The word "estate" is the most general; word that can be used; for, so far from its being necessary to add words of inheritance, in order to make it pass a fee, words of restraint must be added, in order to carry a less estate; for, it is *genus generalissimum*. Besides, it was clearly the intention of the testator to give his whole estate in B. to A., and the rest to C.

4. *ROE, D. CHILD, v. WRIGHT.* H. T. 1806. K. B. 3 Smith's Rep. 229.

The following were the words used in a will: "I give unto my grandson, J. W., all my estate, lands, &c. known and called by the name of the Coal-yard, in the parish of St. Giles, London." The question was, whether the devise took an estate in fee, or an estate for life. The Court held, that the words were sufficient to pass an estate in fee, otherwise the devise of the estate would only be the same as a devise of the lands. All the words must have their proper meaning; and, if so, the word *estate* is not restrained by the word *lands*.

The latter is only descriptive of the local situation of the estate demised, and is tantamount to such expression as "all my estate in lands, &c., called &c." If therefore, the word *estate* is not restrained by the word *land*, the only question is, whether it is restrained by the words "called and known, &c." But of this there can be no doubt, as may be gathered from Vesey, 228; for, though there is a locality, yet the testator meant the interest in it too.

5. *HARDING v. GARDNER.* E. T. 1919. C. P. 1 B. & B. 72; S. C. 3 Moore, 565, S. P. *DEM, D. RICHARDSON, v. HOOD;* 7 Taunt. 35.

The testator devised as follows: "I give unto my brother, J. G., of S., in the county of M., my freehold estate, consisting of 30 acres of land, more or less."

less, with the dwelling-house, and all erections on the said farm, situated at S. in the county of M., now in the occupation of J. G." The testator afterwards bequeathed his personal property to J. G. and other relations. On a feigned issue, the question was, what estate J. G. took in the premises at S. in the county of M.? For the devisee, it was said, that the word "estate" or "estates" will carry a fee, unless the other parts of the will restrain the effect of it. And it was urged that, in this case, the word estate was used in the operative part of the devise, and was therefore, of itself, sufficient to carry a fee, and was not cut down to a life estate by describing it to consist of 30 acres of land at S.; the latter terms merely designated the quantity and local description of the property. For the defendant it was contended, that the testator did not mean it in a technical sense, to give an estate in fee, or for life; but meant to use it in its popular sense, namely, to express the extent and locality of the property, and not the interest he intended to pass. His meaning is not to be derived from other parts of his will, but must be principally confined to that sentence alone, in which he devises the estate in question to the plaintiff, and which must be construed in a restrictive sense, as applicable only to local description, and not to the interest of the estate. He did not express whether he devised it in fee, in tail, or for life, but merely that it consisted of thirty acres, situate at S., then in the occupation of J. G. He does not express what interest he was to take, but merely left him the estate he was then in possession of. It has long been settled that the word "estate" is sufficient to carry the fee. In *Pettisward v. Prescott*, 7 Ves. 451. the Chancellor says: "At an early period, it was doubted whether the word 'estate' merely was to be applied to the land only, or to the interest in it; it has been long settled, that it is of itself sufficient to carry the fee. But when words of locality as 'in' or 'at,' a particular place are added the question is, whether they do not narrow and restrain the import of that word." He then goes on to observe, that, "so late as Lord Talbot's time, this was a subject of doubt;" but after alluding to the cases referred to in *Fort. 157*; 2 P. Wms. 387; 1 Ves. 226; 2 T. R. 658; *Cowp. 299*. he adds, "so that from 1 Vesey, down to 1802, we have the concurring judgments of Lords Hardwicke, Mansfield, Kenyon, and Sir W. Grant, that there is no instance of its carrying a fee, when restrained and confined to mere local description by the addition of the words 'in the occupation of such or such a person.'"—The judges certified that J. W. took an estate in fee of the estate at S.

[218]

6. *UTHWATT v. BRYANT*. M. T. 1815. C. P. 6 Taunt. 317; S. C. 2 Marsh. 30. S. P. *ROE, D. ALPORT, v. BACON*. M. T. 1815. K. B. 4 M. & S. 366.

So the term estate used as referrible to a subject before described by words having no such operation, may carry a fee;

A. devised all his freehold lands, tenements, &c., in the parish of B., to trustees, for a term of 1000 years, in trust to raise 500*l.* by mortgage, for the payment of his debts; subject to which term, he devised his said freehold lands, tenements, &c. in the said parish to his wife for life; remainder to his son C. for life; remainder to trustees to preserve contingent remainders; remainder to C.'s first and other sons, and their heirs male; and in default of such issue, he devised his said freehold estate in the said parish to his daughters, as tenants in common. The Court held, that in default of issue male of A. and C., A.'s daughters took an estate in fee in the devised lands; and certified accordingly to the Vice Chancellor. See 3 T. R. 83; 7 East, 259; 4 Taunt. 176.

7. *DOE, D. BATES, v. CLAYTON*. M. T. 1806. K. B. 8 East, 141.

Although it has been sometimes thought, that the word estate, if used as synonymous with

A testator seized in fee, having only one daughter, A. married to N. B. and two grandsons W. T. B. and M. B., devised: "as for my worldly and temporal estates, &c. I give to N. B. 1*s.*;" but declared that he should not come upon his premises or hereditaments, on any account whatsoever. Then after giving a legacy to his grandson, M. B. he devised to his daughter 20*l.* a year, out of the profits of his estate or lands at Eaton; and then devised to his grandson, W. T. B. "all his messuage and dwelling-house situate at Eaton aforesaid; but that if he should leave his profession, all his right and title to the estate devised

always, as a general rule, be controlled by the context;

and the decease of his brother, and that he was possessed of considerable fortune, both real and personal, which he had intended for his brother, after a bequest to his nephew, J. B., devised all his estates, lands, and tenements in H. F. and M. in England, to his nephew, G. E. B.; and certain other lands, in Ireland, to his nephews, L. B. and C. B.; and afterwards directed that his said nephews should not be entitled to the actual seisin, or possession, of the several estates, bequests, &c. until they should respectively attain 21, the profits, &c. beyond what was required for their maintenance, to accumulate for their respective uses when they attained such age; "and, if one, or more, of my said nephews shall happen to die before attaining 21, then I devise the estates of what kind soever herein-before bequeathed to him or them so dying to my nephew J. B. and his issue lawfully begotten; and, if the said J. B. shall happen to die without issue, then I devise the estates which he should derive or be entitled to under my will, to his next brother, G. E. B. with limitations, in default of such issue, to L. B. and C. B.; and after, to his niece C. B. and her issue, with such other restrictions, &c. as she should dispose of the same to and amongst her said issue, it being the intent and meaning of this my will to prevent waste, by making the several children of my brother deceased tenants for life only." The codicil then gave powers for his said nephews to make reasonable settlements, and to dispose of their respective estates among the issue of such marriages as they should think proper. He then bequeathed the residue not disposed of to his nephews and niece aforesaid, to be divided among them equally, at their respective ages of 21, the shares of him or them so dying to go to the survivors of them. Upon the question, what estate G. E. B. took in the estate at H., it was contended that, although the word "estate" may carry a fee or "issue" may have the same effect in a will as the word "heirs," still the intention must prevail. There may be a particular and general intention; and, if they cannot both stand together, the former must give way to the latter; but both have been frequently sacrificed in endeavouring to preserve the general, at the expense of the particular intent. Here, the words in the codicil, at the utmost, give the plaintiff only an estate tail by implication; for there are none which extend the estate to his issue. If there were no words of restraint, he might have taken an estate tail, not however by force of the terms of the codicil, but by the expression of intent. In this case however, it is manifest that the testator only meant his nephews to take an estate for life; for he explained his intent to be to restrain them from committing waste. This, therefore, is not like the common cases, where tenancies are inserted without impeachment. Besides, the nephews were not to have the benefit of the inheritance, and they, therefore, only took estates for life. It was further provided that, "such of them as married might make reasonable settlements on their wives, and dispose of their respective estates to and among the issue of such marriages as they should think proper to appoint." The issue of such marriages were not to take as heirs, but distributively, according to the disposition of their parents. If either one of the nephews, even if he remained unmarried, could be deemed to take an estate tail, he might, by suffering a recovery, defeat the subsequent dispositions to the future grand nephews, which was clearly not the intention of the testator.

The Judges certified that G. E. B. took an estate for life only in the premises in question.

11. *DOE, D. THE BARONESS LADY DACRE, v. ROGER. M. T. 1809. K. B.*
11 East, 518.

But it has been held, that the mere circumstance of the testator's subjecting the property to a certain an

A testator, after giving to one B. R. an annuity of 400*l.*, went on as follows: "I here give and bequeath to my wife all my property, both personal and real, that I am possessed of now, or may be possessed of, at my decease, either lands, houses, or any other description of property, for ever. After her decease, I give and bequeath to B. R. an additional annuity of 1,000*l.*" &c. The question was, whether the devise to the testator's wife passed the fee in the real estate? It was not denied that the words of devise to the wife first used, would carry the fee; but the argument in favour of the heir at law was

founded upon the subsequent words "giving an additional annuity to B. R. *after his decease*," as showing, it was said, an intention in the deviser to limit the general meaning of the former words. *nuity during the life of the deviser, with a consideration of it after his decease, was not sufficient to restrict a devise of all his property both real and personal for ever, to an estate for life.*

Per Cur. It has never been doubted, that a devise of a man's estate for ever would carry the fee; and the only question in such case is, whether any thing appears in the will to show that the testator meant to give less than the fee? for if there were any inclination expressed in the subsequent part of this will to limit the extent of the first devise to the wife, and to show that the words were used in a more contracted sense, though the first limitation had been to her and her heirs, we should have given effect to the intention so expressed. But, taking the whole of the will together, it imports no more than this: I give all my property to my wife for ever, subject to such annuities, one of which is annuity of 400*l.*, to B. R.; and, if B. R. survive my wife, I give him an annuity of 1,000*l.* more. The giving of this additional sum cannot, we think, be said to show an intention in the deviser to retract the devise of the fee before made to his wife. See Fitz. Abr. Devise, pl. 20; Bro. Abr. Devise, pl. 33; Co. Litt. 9. b.; Barloe, 300; S. C. Dyer, 357. a.; 1 And. 51; Cowp. 304; Cro. Car. 447; 1 Bro. Ch. Ca. 437; 1 Eq. Ca. Abr. 208.

(e 1) *Hereditaments.*

DOE, D. PALMER, v. RICHARDS T. T. 1789. K. B. 3 T. R. 356.

Per Cur. With regard to the operation of the word *hereditaments*, there have been different constructions; in some cases it has been holden to pass a fee, in others not. If we were obliged to give an opinion on the legal import, we should not hesitate; but, it is not necessary to the determination of this case. *The word hereditaments seems to pass a fee.*

(f 1) *Inheritance.*

PUREFOY v. ROGERS. E. T. 1668. K. P. 2 Saund. 380.

In this case it was allowed that the word "inheritance" was quite sufficient to carry a fee. See Hob. 2; Moore, 873. *"Inheritance" carries a fee.*

(g 1) *Interest.*

RIGHT, LESSEE OF MITCHELL, v. SIDEBOTHAM. T. T. 1781. K. B.

2 Doug. 759.

Per Lord Mansfield, C. J. I verily believe, that, in almost every case, where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for, ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. "All my estate," or, "all my interest," will do. But, "all my lands lying in such a place" is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life. *The word "interest" carries a fee.*

(h 1) *Part.**

(i 1) *Property.*

ROE, LESSEE OF SHELL, v. PATTISON. M. T. 1812. K. B. 16 East, 221. *"Properly" is a*

A testator, after making bequests to several of his relations out of his stock in the 4 per cents., devised in the following terms: "After all my just debts and funeral expenses are paid, I leave all the remainder in the above stocks, *with my freehold property*, to my sister, M. S. and all other moneys due to me." It was contended, that the word "property" was of equivocal meaning, and might either denote a description of the interest, or only of the estate or thing devised, according to the intention of the testator. *word large enough to carry the entire interest in real ty.*

Sed per Cur. In Hogan v. Jackson (Cowp. 299), Lord Mansfield was of opinion that the word *effects* was synonymous to property, and would carry a fee. Besides, here there is no other disposition of the real property; and it is plain that the testator meant to give B. some estate in the real as well as in the personal property. See 11 East, 226.

* Whether this word will have the operation of passing a fee, seems to be a *veraxa questio*; see 11 East, 160 in which Lord Ellenborough said, he should be rather disposed to think that such word was sufficient to carry a fee; *sed vide* Cro. Eliz. 52; Skin. 339.

(k 1) *Quit-rents.*

CUTHBERT V. LEMPRIERE. T. T. 1814. K. B. 3 M. & S. 158.

Quit rents, although not the correct expression, may pass the whole interest in copy holds. A. being seised of copyhold premises in X. subject to the payment of certain quit-rents, devised "the *quit-rents* of his lands in X." to B. The Court held, that the fee-simple in the copyhold premises passed to B. on the principle governing all such cases, viz. that if an intention can be gathered from the terms of a will; if it can, without an infringement of any other established rules of construction, be fairly collected by the Court, that the testator, by the particular expression made use of, has meant to convey to the object of his bounty a more enlarged benefit, than the term itself would necessarily import; the Court will, to the best of its ability, endeavour to effectuate his evident intention, and will disregard the signification which would otherwise attach to the mode of expression he has adopted.

(l 1) *Real effects.**(m 1) *Remainder.*

NORTON V. LADD. T. T. 1685. C. P. 1 Lutw. 294. S. P. BAKER V. WALL. 1 Ld. Raym. 186.

The word remainder will convey a fee.† A. having the remainder in fee, subject to a life estate in his mother, devised the lands to his sister for life, after the decease of his mother; then he gave to J. C. the whole remainder of all those lands he had devised to his sister, if he should survive his sister; but if he died before his sister, then his will was, that the whole remainder and reversion of all the said lands should be to the use of his sister and her heirs, for ever. It was contended, that J. C. took only an estate for life; for that these words referred merely to the remainder of the lands, and not of the interest. But the Court said, that that could not be, as the whole of the lands had been before devised. It referred to the residue of the estate undisposed of to his sister, and consequently, a fee passed to J. C.

(n 1) *Residue.‡*(o 1) *Right, title, and interest.*

COLE V. RAWLINSON. H. T. 1700. K. B. 1 Salk. 234; S. C. 2 Ld. Raym. 831; S. C. Holt, 744; Judgment affirmed, Dom. Proc. 1 Bro. P. C. 108. S. P. WILSON V. ROBINSON. 2 Lev. 91.

The words "right, title, and interest," will pass a fee simple. A woman, being tenant for life of a house, with the remainder in tail to her son, and the reversion in fee in herself, devised all her right, title, and interest, in the house to her son. It was held, by the Court of K. B. contrary to the opinion of Holt, that the son took an estate in fee simple. The decision however, was founded on the circumstance, that the son having already an estate tail in the house, if he took no more by the will than an estate for life, he had really nothing given.

(p 1) *Share.*

PARIS V. MILLER. M. T. 1816. K. B. 5 M. & S. 408.

A devise of "my share of &c., situate at, &c." where the testator was seised in fee of her undivided fifth part of certain estates was held to pass a fee. A testatrix, being seised in fee of an undivided fifth part, and of a moiety of another undivided fifth part, devised as follows: "My *share* of the Bastile and other estates, situate at C. and now in the occupation of T. & C. to my sister C. W." Upon this devise, it became a question, what estate C. W. took in the said one undivided fifth part, and a moiety of another undivided part, under the said will. The Court thought that she took a fee; and Lord Ellenborough C. J. said: the words *my share*, as it seems to me, were used as denoting the interest; those which follow, the thing devised and its locality; and the latter words, which describe the occupation, relate to the last antecedent, moiety of the estates, and not the word "share." It appears to me, that the word *share* passes the fee. See Cro. Eliz. 52; S. C. 3 Lev. 180; S. C. 2 Leon. 129.

* The words "real effects" will be sufficient to convey the testator's entire interest; Cowp. 299; 3 Wils. 333.

† So it is said, that the word "reversion" will have that effect; 2 Ves. sen 48; *sed vide* 1 Vern. 45. But although these terms will pass such interest, yet it is clear that the terms "residue and remainder" as ordinarily used in residuary clauses, will not have this effect.

‡ By a devise of the residue the inheritance passes; Cliffe v. Gibbons, 2 Ld. Laym. 1825; Carpenter v. Chapman, 9 Mod. 92,

193; 2 Vern. 388; Com. Dig. Devise (N. 7.); Skin. 339; Vin. Abr. tit. Devise, L. a. pl. 11; 11 East, 160; 1 Ves. 228; 2 T. R. 659.

(q 1) *To be freely possessed and enjoyed.*

1. LOVEACRES v. BLIGHT, M. T. 1775. K. B. Cowp. 352. S. P. GOODTITLE v. ORWAY, 2 Wils. 6.

A testator after an introductory clause, showing an intention to dispose of his whole estate, gave to his sons, T. M. and R. M., all his lands and tenements freely to be enjoyed and possessed alike. The question was, whether a fee passed. Lord Mansfield said: the principles by which this case must be governed, are settled by analogy to establish rules respecting the limitation of estates by deed at common law. If a man, by deed of conveyance at common law, gives land to another generally, without words of limitation, the donee has only an estate for life. But I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator; for common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of land or real estate. But, as they know when they give a man a horse, they give it for ever; so they think, if they give a house or land, it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the Court must determine, in the case of a devise affecting real estate, that the devisee has only an estate for life; because the principle is fully settled and established; and no conjecture of a private imagination can shake a rule of law. But, as this rule of law has the effect I have just mentioned of defeating the intention of the testator in almost every case that occurs, the Court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. Therefore if a man says, "I give all my estates" that has been construed to pass a fee; or, even if words of locality are added, as "all my estate in A." it has been held, that the whole of the testator's interest in such particular land will pass, though no words of limitation are added; (2 P. Wms. 521.) because the law says, that the word "estate" comprehends not only the land or property which a man has, but also the interest he has in it. So, in a late case from Ireland (Hogan, ex d. Wallis v. Jackson, Cowp. 229.) the Court had no difficulty in saying, that the words "all my worldly substance," in the introductory part of the will, meant every thing the testator had; and that the words "all his real effects," in the subsequent residuary devise, were equivalent to worldly substance, and carried every thing to the residuary devisee. In general, wherever there are words and expressions, either general or particular, or clauses in a will which the Court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place. So, if the Court cannot find words in the will sufficient to carry a fee, though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law. Here however, we entertain no doubt; but are of opinion that a fee passes.

2. GOODRIGHT, D. DREWRY v. BARRON. E. T. 1809. K. B. 11 East, 220.

After introductory words, as touching the testator's worldly estate, &c. the testator devised a cottage house, &c. to A. and his heirs, and also gave to B. whom he made his executrix, "all and singular his lands, messuages, and tenements, by her freely to be possessed and enjoyed."

The Court held, that the latter words being ambiguous did not pass the fee against the heir, but might mean free of incumbrances or dispunishable of waste, and that the word "estate" in the introductory clause could not be brought down into the latter distinct clause.

(r 1) *Whatever else I have not disposed of.*

HOFEWELL v. ACKLAND. H. T. 1709. K. B. 1 Salk. 239; S. C. 1 Com. 164.

A person devised his manor of B. to A. and his heirs, and then proceeded thus: "Item, I devise all my lands, tenements and hereditaments, to the said A. Item, I devise all my goods and chattels, money and debts, and whatever

The words
"freely to
be enjoy
ed," have
been held
to pass a
fee.
[225]

But in a
subsequent
case these
words were
held not to
encompass
[226]

have such
an exten
sive import.

A fee will
pass under
the words
"whatever
else I have
not dispos
ed of."

else I have not before disposed of, to the said A. he paying my debts and legacies." Trevor, C. J. held, that under the concluding clause, whatever he had not disposed of, an estate in fee passed.

(d) *When implied.*

(a 1) *General observations.*

1. DOE, D. DRIVER, V. BOWLING. E. T. 1822. K. B. 5 B. & A. 722; S. C. 1 D. & R. 367. S. P. SMARTLE V. SCHOLLER. T. JON. 98; 2 Lev. 207. S. P. WRIGHT. V. WYVELL. 2 Vent. 56. S. P. LEIFE V. SALTINGSTONE. 1 Mod. 189; S. C. 2 Lev. 114. S. P. MALLOON V. FITZGERALD. 3 Mod. 32; S. C. 2 Show. 315; S. C. Skin. 125. S. P. THOMLINSON V. DIGHTON. 1 Salk. 239; 1 Com. 193. S. P. GOODTITLE, D. HART, V. KNOT. Cowp. 43. S. P. OATES, D. MARKHAM, V. COOKE. 1 Bl. 543; S. C. 3 Burr. 1604.

As to when a fee simple will be implied, it may be presumed as an universal rule; that where problematical in 227 | forences will not suffice.*

Ejectment. A testator, possessed of real and personal property, devised the former to his three daughters, in separate and specific portions, and directed the latter to be sold and divided between them, share and share alike, as soon as they respectively attained the age of twenty-two, the interest to be applied to their maintenance and education during minority. As to the real property so devised, he directed, "In case either of my three daughters, E., A., or S., shall die before twenty-two, or die single, or before marriage, the portion of the deceased shall be equally divided between the survivors, share and share alike, or their heirs; also in case two of my daughters die without heirs, then the whole devolves to the surviving one and her heirs, *in case no husband is living*; if so, *they enjoy the property during life only*, and afterwards her or their fortune goes to the heir or heirs of their sister, as heirs at law. I also make this reserve: In case all my three daughters should die without heirs, and have no husband living; or, at the decease of the said husband or husbands, should it happen such then exist, I give out of the before-mentioned estates, 100*l.* each, to W. A., R. A., E. & A., &c. Also, I give, *in such case, only as above*, 100*l.* to S. G. and 20*l.* to J. G. &c.; and if this should so happen when those legacies are so paid, I leave and give all residue of my estates that remains to be sold and equally divided, share and share alike, amongst my brothers, J., E., and G. H., and sister S. B., or their heirs, share and share alike." Testator's daughter E., died unmarried before 22; the daughter A. married the defendant after 22. and died without issue; and the daughter S. also married after 22, and died leaving issue.

It was admitted on the part of the plaintiff, that the defendant was entitled to enjoy for life that part of the testator's property which was specifically bequeathed to A. whom the defendant married; but it was contended, that he was entitled to no portion of that which lapsed upon the death of E., because that property was expressly given to the latter and her heirs for ever, which devise operated as a complete disposition of the property, and consequently could not be controlled by any subsequent part of the will. To support this construction reliance was placed upon the residuary clause, which it was contended had reference only to the division of the testator's personal property, and did not comprehend the real property. The words portion and fortune, in that part of the will which respected the husbands, were also relied upon as indicating that the testator had nothing but his personal property in contemplation, and that, at most, that clause could only be construed to give the defend-

* As an exact illustration of the difference between what the law denominates a necessary implication, and one which is not so, the following rule may be stated: that a devise to the devisor's heir, after the death of A., will give A. an estate for life by implication; but that, under a devise to B., a stranger, after the death of A., no estate will arise to A. by implication. - In the former case, the inference, that the devisor intends to give an estate for life to A., is irresistible, as he cannot, without the greatest absurdity, be supposed to mean to give his land to his heir at the death of A., yet that the heir shall have it in the mean time, as would be the case, unless A took it. On the contrary, when the devisee is not the heir, however probable it may be, that by fixing the death of A. as the period when the devise to B. was to take effect in possession, the devisor intended that he should take it for life; yet it is possible to suppose that, intending the land to go to the heir during the life of A., he left it for that period undisposed of: see 2 Powell by Jarman. p. 109.

ant a share in E.'s personal property. On the other hand, it was insisted that, as the other daughter E. had died in the life-time of her sister A. the latter immediately became entitled to the moiety of the share of her deceased sister, in addition to the share given originally to herself; and that the defendant himself, upon the death of A. his wife, had a life interest, if not expressly by the will, at least by implication, in all that to which she was at the time of her death entitled. This construction, it was contended, was borne out by the whole scope of the will, and more particularly by the clause relating to the husbands, which implied that the heirs of the daughters could not take until the death of their respective husbands.

Per Cur. If the clause of this will "in case either of my three daughters shall die before twenty-two, or die single, or before marriage, the portion of the deceased shall be equally divided between the two survivors, or their heirs; and also, in case two of my daughters die without heirs, then the whole devolves to the surviving one and her heirs, in case no husband is living; if so, they enjoy their property during life only," extends to the real estate, then we think there is no doubt that this husband is entitled to an estate for life by implication. Looking to the whole of this will, we have no difficulty in saying that this clause does not extend to the real estate; and, therefore, that the defendant takes an estate for life, in the premises devised in the first instance to his wife, and also an estate for life in a moiety of the premises devised to his wife's sister. We think the residuary clause will apply equally to freehold as well as personal property, and therefore no argument can be derived from that clause in favour of the construction contended for on the part of the plaintiff. *Postea* to the defendant.

2. *BETTISON v. RICKARDS.* M. T. 1816. C. P. 2 Marsh. 413; S. C. 7 Taunt. 105. S. P. *GRUMBLE v. JONES.* H. T. 1708. K. B. 11 Mod. 207; S. C. 1 Salk. 178. S. P. *FORD v. OSSULSTON.* M. T. 1707. K. B. 11 Mod. 183; S. C. 3 Salk. 336.

A. being seised of divers estates, some in fee, some for life, some for the lives of others; and the rest in remainder, after an estate tail in his son, devises as follows: I devise all my estates, both real and personal, and wheresoever situate, which I am possessed of or entitled to, and of which I have power to dispose, to B., her heirs, &c., for ever, subject to debts and legacies; and in case my son should die without issue of his body, then I devise all my real estates, not hereinbefore disposed of, situate in the several counties of C., D., E., and F.; and also all my personal property to B. for life. The testator had an estate in fee in lands, in the counties of E. and F., and the reversion in lands in C. and D. after an estate tail in his son; but none of the latter description in E. and F. The Court held, that B. took an estate in fee in E. and F. under the first clause, unrestrained by the second clause.

3. *DOE, D. COTTON, v. STENLAKE.* T. T. 1810. K. B. 12 East, 515. S. P. *ANON.* E. T. 1673. C. P. Cart. 232.

A devise contained a gift of certain real estates to "his daughter A. B. and her heirs, during their lives." A. B. had two children before, and another after, the making of the will. It was contended, that the latter words "during their lives" should be rejected, being repugnant to the devise to A. B. and her heirs.

Per Cur. These words are merely the expressions of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could, in fact, only enjoy the benefit of it for their lives. Besides, as the interpretation attempted to be put on the will would exclude the after-born child from taking, that alone is sufficient reason against it. See *Burr.* 1100.

4. *DOE, D. ORFE, v. FROST.* E. T. 1823. K. B. 1 B. & C. 638; S. C. 2 D. & R. 678.

Testator devised a portion of his lands to his daughters E. and A., to be equally divided between them at his death, and willed, that at their respective deaths their respective shares should be equally divided between their several

[228]

But, on the other hand; on the same principle, a fee may be allowed to pass, altho' an adjoining clause may give rise to an opposite conjecture. Where, therefore, the testator's intention was rendered evident, by the objects of his bounty being placed in such a situation, as to make it probable that the testator could mean a fee to pass, the Court allowed the will to carry such an interest. As where an indefeasible

nite devise was made to a class, [229] and expressions were afterwards used as to one of the individuals constituting the class, which indicated that the testator intended him to take a fee in his share, the same intention was inferred as to the co-devisees.

and respective children; but if A. died without issue, then he gave her share to E. for life, and at her decease to her children, share and share alike. He then gave to all his grandchildren, who should be living twelve months after his death, 5l each. The residue of his real and personal estate he gave to his only son B.; but if he died without issue, then he gave his share of the estate to all the grandchildren who should then be living, share and share alike. Then he introduced certain qualifications respecting the devises he had so made, and for the first time mentioned any of his grandchildren by name. First he directed that such of these last shares, as should belong to his grand-daughter E. S., should be placed in the hands of her father, W. B., his executors or assigns, the interest to be paid her during her life, and at her death the principal to be divided among her children, share and share alike. Next he specifically directed, that such share or shares of the land he had devised to his daughters, E. and A., and likewise such share or shares of money as might become due, by virtue of the will, to his grandson and grand-daughter, Robert and Hannah, (children of his daughter E.) should be placed in the hands of their brother James, his heirs or assigns, to pay the rents, &c. to them during their lives; and after their death, his or her respective shares to become the property of his or her heirs or assigns for ever. Nevertheless, if the brother James should at any time thereafter think right and proper, he might deliver up to Robert at any sooner period, all or any part of his share or shares, unto his only proper use, his heirs and assigns for ever. The Court held, that if the disposing part of the will did not give an estate in fee to testator's daughters E. and A. and their children, yet it was clear, from the qualifying parts, that such was his intention; and consequently that the children of E. (A. having died without issue) took an estate in fee, in the land so devised to their mother.

5. *Doe, v. Wood, v. Wood.* E. T. 1818. K. B. 1 B. & A. 518. S. P. *Preston v. Funnell.* 7 Mod. 296; Willes, 164.

So, a devise of lands to W., "to be kept in the name and family of W., as long as can be," was held to carry an estate of inheritance. But a partial restraint against alienation has been considered as insufficient to bar the vesting of a fee.

A testator devised a particular estate by name to T. W., his heir at law, and then devised to H. W. all the residue of his lands, "to be kept in the name and family of the W.'s as long as can be." The question was, whether H. W. took an estate of inheritance or for life.

Per Cur. In order to carry into effect the purpose of the testator, we must give to the devisee such an estate as may enable him to keep the property in the family, and in the name of W. S. as long as can be. Now to enable H. W. to do this, he must take more than an estate for life. See *Doug.* 759; *Cowp.* 657.

6. *Doe, v. Gill, v. Pearson.* H. T. 1805. K. B. 6 East, 172; S. C. 2 Smith's Rep. 295.

A testator devised his lands to A. and B. two sisters, and their heirs for ever upon this condition, that in case they or either of them should have no lawful issue, they or she having no lawful issue should have no power to dispose of her share, except to his sister or sisters, or to their children; and he gave all the rest, &c. of his real and personal estates and hereditaments, by his will before disposed of, to the said A. and B., their heirs, executors, and assigns. On the testator's death, A. and B. entered, and afterwards A. levied a fine of her moiety to the use of her husband, in fee, and died. One of two co-heiresses entered on the said moiety, and afterwards brought this action of ejectment.—A verdict was found for the plaintiff, subject to the opinion of the Court as to the plaintiff's right of recovery; it being urged, that the condition annexed to the estate of A. and B. was not good in point of law; and that admitting that A. took an estate tail in common with her sister, yet they would take the remainder in fee, as joint tenants, under the residuary clause; and the fine, which would pass future as well as present interests, being only levied of her moiety, to which she was clearly entitled, would attach not only upon her estate tail which she held in common, but also upon her joint reversion, of which it would sever the jointure, and then the declaration of A. would give it to the husband of A. under whom the defendant claimed.

[230]

Sed per Cur. We think that the condition is good; for according to the case of *Daniel v. Ubley* (Sir W. Jon. 137. & Latch. 9. 39. 134.) though the judges did not agree as to the effect of a devise "to a wife, to dispose of at her will and pleasure, and to give to which of her sons she pleased;" yet it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor, which estate Jones, J. thought the devise gave, if it did not give a life estate, with a power of disposing of the reversion among the sons. And there is a case to this effect in *Dalison's Rep.* (58). "A devise to a wife to dispose and employ the land on herself and her sons at her will and pleasure;" and *Dier and Walsh* held she had a fee simple but that it was conditional, and that she could not give it to a stranger, but that she might hold it herself, or give it to one of her sons. The first devise may therefore operate as a devise on condition. But it has been contended, that the residuary clause operates as a devise over, on non-performance of the condition. We are, however, of opinion, that the residuary clause cannot be considered as a devise over, for it appears to be in the contemplation of the devisor merely to dispose of those things which had not been before disposed of by the will. Let the *posita* be therefore delivered to the plaintiff. See *Co. Litt.* 214. b. 215. a; *Bridgm. Rep.* 137.

7. *DOE, D. LEE, COMPERE V. HICKS.* M. T. 1797. K. B. 7 T. R. 433.

Devise to A. for life, and after the determination of that estate unto trustees and their heirs, in trust to preserve contingent remainders, &c.; nevertheless, to permit A. to receive the rents during his life; and from and after his decease, unto his first and other sons successively in tail male, with several remainders over in like manner; estates to trustees and their heirs generally being interposed after each life estate. The Court were of opinion, that the trustees, notwithstanding the general terms of the limitation to them took estates only for the lives of the respective tenants for life, the nature of their trust requiring them to be thus confined, and the testator having shown this to be his intent, by repeating to them the same estate after each subsequent estate for life.

And it has been held, that a devise to trustees in fee may be reduced to an estate for life, by implication of the testator's intention.

[231]

(b 1) *From a charge being imposed.*

(a 2) *On the devisee, or on the devisee in respect of the land.*

(a 3) *Of a gross sum.*

(a 4) *In general.*

1. *REEVES V. GOWER.* H. T. 1708. C. P. 11 Mod. 203. S. P. *MOOR V. PRICE.* T. T. 1672. K. B. 3 Rep. 49. S. P. *LEE V. WITHERS.* E. T. 1678. K. B. T. Jon. 107. S. P. *BADDELEY V. LEPPINGWELL.* T. T. 1764. K. B. 3 Burr. 1533. S. P. *DOE, D. HANSON, V. FYLDES.* T. T. 1778. K. B. Cowp. 841. S. P. *SALMON V. DENHAM.* 1 Com. 323. S. P. *ANON.* 3 Salk. 127.

If a person devise lands, with a direction that the devisee shall pay a gross sum out of it, the devisee will take an estate in fee simple, without any other words;*

A. by his will devised lands to B., and then bequeathed legacies, and gave 5l. to C., and directed B. to pay it; but gave him two years for that purpose. The jury found the land to be worth 50s. a year. The Court held, that B. took a fee.

2. *MOONE, D. FAGGE, V. HEASEMAN.* H. T. 1738. C. P. Willes, 138. S. P. *READ V. HATTON.* E. T. 1675. C. P. 2 Mod. 26; Willes, 140; *Semb. contra, DOE, D. COLE, V. WESTON.* T. T. 1778. C. P. 2 Bl. Rep. 1217.

In this case, Willes, C. J., held, that a devise of certain lands to Dame M. F. for life, and over, after her decease, to his daughter, E. G., paying to each of her sisters 500l. and gave E. G. an estate in fee; and the learned judge, after observing that it was formerly doubted whether the devisee took a fee simple, unless the sum charged exceeded the annual value of the estate, said, that it had long been settled that such a devise gives a man a fee simple, of the land.

* This construction is founded on the principle that a devise of land shall, in all cases, be intended for the benefit of the devisee. Now, if a devisee was in cases of this kind only to take an estate for life, he might die before he received from the land the gross sum he had paid, and consequently be a loser by the devise.

without any regard to the *quantum* (of the debts, or) of the sum devised to be paid, and the value of the lands.

3. *GOODTITLE, D. RICHARDSON, v. EDMONDS. E. T. 1798. K. B. 7 T. R. 635.*

But no implication will arise, where the sum directed to be paid by the devisee is a debt owing to the testator;

[232]

The testator devised two houses to his wife, during her widowhood, and after giving another house to his wife absolutely, he willed that, on payment of a sum of money (due to him) to the wife, by B. the testator's eldest son and heir, B. should share equally with the rest of his brothers and sisters, C., D. and E. and if any of his children should die, then the share of him or her should go among the survivors. Then, after disposing of some personally, he willed that his wife should not dispose of any of the household goods; but after her decease, or marriage, that they, with the houses aforesaid should be equally shared among his said children, as aforesaid, or as she should think proper to dispose of among them. This was an action of ejectment by the heir of D. who survived B. & C., but died in E.'s life-time. The Court held that only estates for life passed to the children, there being no circumstances in the will to supply the want of words of perpetuity; and Lord Kenyon, C. J. observed: I admit that if the purposes of the will cannot be answered, but by the devisees taking a fee, a fee will pass, as in *Shaw v. Weigh* (Fitzg. 18. 2. 803; Fort 71) or where an estate is given to the devisee, he paying a sum of money; but I know of no other case where a devisee takes a fee, unless there be words in the will (though no technical words are necessary for that purpose) sufficient to pass a fee. This is a sacred rule of property not to be broken in upon; if we were now to depart from it, it would be removing one of the great land marks of real property.

Or where express words are used rebutting such implication;

4. *DOE, D. BURDETT, v. WRIGHT. T. T. 1819. K. B. 2 B. & A. 710.*

A testatrix, after charging her estate with the payment of an annuity, devised the same to G. S., his heirs and assigns, for ever, but her wish and desire was, that G. S. in his life time, should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; and subject to this, G. S. was to enjoy the estate to his own use for his life. The Court held, that this was a devise void by 9 Geo. 2 c. 36. by which act, the estate given, and not merely the trust, was made void; and that the legal estate, upon the death of the devisee for life, descended on the heir at law. By the codicils to the will, certain legacies were bequeathed, charged upon the estate, and a power was given to G. S. (who was also named executor) to cut down timber to pay them, and interest was directed to be paid by him to the legatees, after the expiration of two years. The Court held, that the personal charges could not raise by implication the express estate for life given to G. S. by the will, into an estate in fee.

Or, where it otherwise appears, that the devisee was not intended to take the entire benefit; as where the property is devised over, after his death. So the estate of a devisee will not be enlarged, in consequence of a

5. *DOE, D. COLE, v. WESTON. T. T. 1778. C. P. 2 Bl. Rep. 1215.*

This was a devise to A. & B. of all the testator's real and personal estate, to be equally divided between them, or the longest survivor, paying the testator's lawful debts; and after their decease to the male heir. The Court held, that A. & B. only took a conditional estate for life.

6. *ROE, D. PETER, v. DAW. H. T. 1815. K. B. 3 M. & S. 518.*

A devise had been made by a testator as follows: "all my lands in T. to A. B. during her natural life; and after her death, to T. B. his heirs and assigns; and for want of heirs begotten by T. B. to M. B. and E. B. *except 20l. to be paid out of E. B.'s part of the lands to M. B.*" The Court held that these words did not enlarge the devisee's estate to a fee, it being a charge antecedent to the devise, and not a devise upon the condition of paying; it was collateral to the interest of the devisee. *Except* indicated that M. B. should take the 20l., independently of any interest in E. B.

(b 4) *For payment of debts and legacies.*

1. *DOE, D. WILLEY, v. HOLMES. M. T. 1798. K. B. 8 T. R. 1. S. P. GOORRIGHT, D. PHIPPS, v. ALLIN. M. T. 1776. C. P. 2 Bl. Rep. 1041. S. P. FREAK v. LEE. T. T. 1756. K. B. 2 Show. 38; S. C. 2 Lev. 249. S. P. HAYMAN v. MOON. 7 Mod. 430. S. P. SMITH v. TYNDAL. 2 Salk. 685;*

[233] charge being made on the land.

11 Mod. 102. S. P. BADDELEY v. LEPPINGWELL. 3 Burr. 1533. S. P. A devise of lands charged with the payment of debts and legacies, *Thacker's Case*, Cart. 225.

A. B. devised his freehold house, and all the furniture thereto belonging, to C. D. whom he made executrix, she paying all his just debts and funeral expences, and the legacies before mentioned. He likewise left to the said C. D. all the rest and residuo of his personal estate. The question was, whether C. D. took only an estate for life, or in fee? The Court were of opinion that C. D. took a fee; and observed, that the devisee was bound to pay the debts and legacies at all events, the charge being thrown on her in respect of the real estate.

2. GOODTITLE, D PADDY, v. MADDERN. H. T. 1804. K. B. 4 East, 496; S. C. 1 Smith's Rep. 185.

In this case a devise was brought before the Court. It was (*inter alia*) as follows:—"All the rest I have in the world, both houses and lands, goods and chattels, stock in trade, and all other things that belong, or may belong to me, I give to my present wife, S. P. my executrix, so that she shall sell my stock in trade and household goods; and if these will not pay the debts, she shall next sell the house of fee in Penzance, so that my executrix shall pay, in good time all lawful debts." It was contended, that the charge of debts on the real estate, being contingent only in failure of the personalty (the adequacy of which was admitted,) did not give a fee. *Sed per Cur.* The distinction is well settled between the effect of a charge on the person of the devisee and a charge on the estate devised. The one carries the fee, the other does not. Now, here we take it, that the debts were meant to be a charge upon the executrix and devisee. The devise of both the realty and personalty is made to be "so that she pay all lawful debts," &c. But having given her both, the deviser recommends to her to part with the personalty first, before the house, in satisfaction of the debts. But she had the same power over both.

See 4 T. R. 89; Cowp. 355, 5 Inst. 538; 558; 6 id. 175; 8 id. 1; 1 B. & P. 558; 2 id. 247; 2 Atk. 341; 3 T. R. 356.

3. DOE, D. BRISCOE, v. CLARKE. M. T. 1806. C. P. 2 N. R. 343. S. P. DOE, D. JACKSON, v. RAMSBOTHAM. H. T. 1815. K. B. 3 M. & S. 516. S. P. WHALLEY v. REEDE. 1 Lutw. 321.

A testator, after a general introductory clause, "as to his worldly estate," devised to his wife, during her natural life, all his houses in Swan-lane. He then devised several houses, without words of inheritance, to his sons, T. B. and S. B.; and after the death of his wife, he gave to his son W. B., all these his three houses or tenements situate in Swan-lane in the tenure or occupation of A., B., and C. He likewise gave several legacies, to be paid within six months after his death; and concluded thus: "And I charge all my estates, both real and personal, with the payment of the above, or afore-mentioned legacies; and I appoint my beloved wife and my son T. B., my son S. B., and my son W. B., executors of this my will; and after my just debts and funeral expences are paid, then the surplus of my effects, both real and personal to be equally divided to my executors which shall be then living."

The Court held, that W. B. took only an estate for life, under the devise of the three houses in Swan-lane, after the death of his mother, notwithstanding the words of charge, &c.; but that he took a fee in one-fourth part, under the residuary clause. See 6 Co. 16; Cowp. 299; 5 T. R. 292; 8 id. 64; 1 N. R. 335; 5 East, 87; 1 B. & P. 30; Cro. Eliz. 330; Moor. 594. Prec. Ch. 67.

(c 4) *After payment of debts.*

DENN D. MILLER, v. MOOR. E. T. 1794. K. B. 5 T. R. 558; S. C. 6 id. 176; S. C. reversed H. T. 1796. Exch. Ch. 1 B. & P. 558; but affirmed T. T. 1800. Dom. Proc. 2 B. & P. 247; S. C. 7 Br. P. C. Tomlin's edit. 607. S. P. DOE, D. JACKSON, v. RAMSBOTHAM. H. T. 1815. K. B. 3 M. & S. 516.

A special case stated the following devise: "I give and devise unto N. all

* But it would seem, that charges of debts and legacies, in *express* terms of contingency, are not within the above principle: 2 Atk. 341; 6 T. R. 497.

lands charged with the payment of debts and legacies, will, for the same reason, pass an estate in fee simple.

Where, therefore, A. devised "all the rest I have in the world to B.," his executrix, so that she should sell his personal property; and if it would not pay the debts, she should next sell the real, so that B. should pay in good time all lawful debts; it was held, that the fee was become vested by the terms of the will.* [234] But a mere charge of debts and legacies upon the land devised does not enlarge the devisee's quantity of interest.

A devise to A: of the realty and

personality subject to the testator's debts, &c. was holden in sufficient to give an estate in fee. that my customary messuage, situate, &c. All the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expences, I give, devise, and bequeath, the same unto my wife S.; and I appoint her my sole executrix." It was contended that the wife took a fee; and the case of *Doe v. Richards*, 3 T. R. 356. was relied on.

But the Court observed, that there the debts were to be paid by the devisee, and were a charge on the estate in his hands. But here, although the real estate is charged in aid of the personality, with debts and funeral expences, yet there were no words charging it in the hands of the wife; and therefore, it came within the case of *Merton v. Blackmere*, 2 Atk. 341; and S. took only an estate for life.

1. *DOE, D. MEACOCK, v. ALLEN*. H. T. 1800. K. B. 8 T. R. 497.

So a devise of my real and personal estate to A., subject to my debts the personal estate to [235] be first applied, was only allowed to pass an estate for life.

The testator devised in these words: As to what real and personal estate it hath pleased God to bless me with, I give and dispose of the same as followeth: "1st, My will is, that all my debts and funeral expences be justly paid off and discharged out of my personal estate; and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being, &c. unto W. A." And the question was, what estate passed by these words? *Per Cur.* The debts are not, at all events, charged on the real estate, but only contingently, if the personal estate should not be sufficient; and therefore do not come up to the uses cited, of a gross sum to be paid out of the land devised; and consequently the words give no more than an estate for life to the devisee.

(b 3) *Of an annual sum.*

1. *GOODRIGHT, D. BAKER, v. STOCKER*. M. T. 1792. K. B. 5 T. R. 93. S. P. *SMITH v. TYNDAL*. E. T. 1705. K. B. 2 Salk. 685; S. C. 11 Mod. 102. S. P. *LEE v. STEPHENS*. T. T. 1677. K. B. 2 Show. 49; S. C. 2 Jon. 107; S. C. Pollexf. 539. S. P. *SCRAPE v. RHODES*. C. P. Com. 542. S. P. *REED v. HATTON*. 2 Mod. 25. S. P. *WHEATLY, D. MANLEY, v. BOSVILLE*. Ca. Temp Hard. 258.

The same rules apply in cases of charges of annual sums.

The introductory part of a devise was "all such temporal estate of lands, goods, and chattels, as God hath endowed me with, I give, devise, and bequeath, thereof as followeth." Then testator devised to his grandson, J. B., his higher dwelling-house in the town of S., paying yearly, and every year, out of the said dwelling-house, the sum of 15s. unto A. The question was, whether J. B. took an estate in fee, or for life?

Per Cur. The annuity charged on the premises was intended to continue for A.'s life, though not expressly mentioned so, and therefore of necessity J. B. took a fee.

2. *ANDREW v. SOUTHOUSE*. T. T. 1793. K. B. 5 T. R. 292.

Under a devise, therefore, to A. for life, and then to B., charged with an annuity to C. during his life, B. was holden to take a fee.

A case reserved stated, that the testatrix gave certain lands to A. for life, and then to B., his heirs and assigns for ever. It also stated that the testatrix "gave and bequeathed all those my messuages, lands, tenements, and hereditaments at W., late the estate of T., and all other my part, share, and interest of and in the estates of the said C. unto A. and her assigns, during her life; and after her decease, I give and devise the same unto E., charged nevertheless with the payment of one annuity of 20l. per annum to J. during his life." The question was, whether J. took an estate in fee, or for life only? In the course of argument, a distinction was taken in favour of the heir at law, between a charge on the person of the devisee, and a charge on the land, as was said to be the case here; because, in the latter case, it was said, the land itself was charged with the annuity into whosoever hands it came; nor could any loss accrue to the devisee, because he would be bound for payment only during his possession of the estate.

But the Court held, that E. took an estate in fee, because, out of what estate could the annuity to J. be paid, if E. did not take an estate in fee; for he might survive E.? *Ashurst, J.*, expressed his doubt whether, if E. were not

to take a fee, and he were to die in J.'s life-time, the annuity would be payable after his death.

3. *DOE, D. BEEZLEY, v. WOODHOUSE.* M. T. 1790. K. B. 4 T. R. 89. [236]

A special verdict stated that the testator, being seised of freehold and copyhold, and possessed of leasehold estates, after directing his debts and funeral expenses to be paid out of his whole estate by his executors, bequeathed his leasehold estate, together with all other his real estates, to his wife for life; and likewise he gave to her all his personalty during her life, and empowered her to dispose of part thereof by will, and the remainder of his goods and furniture he directed to be sold by his executors, and the money to be divided between C., D., E., F. and G. He then gave two annuities to H. and I., to be paid by his executors out of his whole estate; the aforesaid dividends of the money arising from the sale of his goods, and the yearly payments out of his estates to H. and I. not to commence till after his wife's death; and he afterwards devised the remainder of the profits after the wife's death, and subject to yearly payments to H. and I. out of his whole estate, to B., C., and D., equally, share and share alike. The question was, whether the words *whole estate*, in the latter part of the will, extended as well to the real as the personal property? On behalf of the heir at law, it was contended that, since the words in question referred, in the former part of the will, to personal estate only, they ought to receive a similar construction in the latter part of it; especially as, in this case, there was a surplus of the personal estate, after payment of debts and legacies, of about 2000*l.* But the Court were clearly of opinion that by *whole estate* the testator almost throughout his will meant real estate, and that this was the only construction which these words could admit of in the clause directing the payment of the annuities, since they stood in contradistinction to the produce of personalty. It was then a necessary consequence that the executors took a fee.

So, where a testator, after giving the residue of his personalty, gave specific annuities to be paid out of his whole estate; it was held, that, by *whole estate*, the devisee meant his real estate, and that the devise of the remainder of the profits out of his *whole estate* passed a fee.

4. *JENKINS v. JENKINS.* M. T. 1752. C. P. Willes, 610.

A testator devised to M. H. *5*l.** a year to be paid to her out of certain premises by his executor as long as she should live; and he gave to J. J. all his lands, goods, and chattels, and appointed him sole executor. Willes, C. J., held, that he should take such an estate in the lands as would last as long as the annuity was payable. Whether he had an estate for the life of an annuitant, or in fee, he observed, they need not determine, because the annuitant was alive; but they were rather inclined to think that he took an estate in fee, because there is no one case where the devisee, by virtue of the word "paying" has been adjudged to have a larger estate than for his own life, in which it has not also been adjudged that he took an estate in fee.

And it matters not that the annuity is directed to be paid by the devisee out of the land.*

(b 2) *On the devisee in respect of the annual profits.*†

(b 1) *From a limitation over, or a dying under a certain age.*

1. *DOE, D. ELSMORE, v. COLEMAN.* M. T. 1818. Ex. 6 Price, 179. S. P. FROGMORTON, D. BRAMISTONE, v. HOLIDAY. H. T. 1765. K. B. 3 Burr. 1618. S. P. MARSHALL v. HILL. E. T. 1814. K. B. 2 M. & S. 603. S. P. TOOVEY v. BASSETT. H. T. 1809. K. B. 10 East, 460. S. P. STILES, D. RAYMENT, v. WALFORD. 2 Bl Rep 938. S. P. DENN, D. SATTERTHWAITE. K. B. 2 Bl Rep. 519. S. P. GINGER, D. WHITE, v. WHITE. Willes, 343. *Semb. contra*, FOWLER v. BLACKWELL. 1 Com. 353.

The testator devised as follows, "I give, devise, and bequeath unto S. F. all that my freehold messuage or tenements, &c., to hold the said messuage, lands, and premises unto the said S. F. and her assigns, for and during the term of her natural life, she paying yearly out of the same unto her said daughter H. H. the sum of 100*l.*, the same to be paid into her hands for her own separate use and benefit, at four quarterly payments. And from and after her decease, I give and bequeath the same to such child or children as shall be

A fee may be implied from a devise over, if the devisee die under a certain age.

* But if the annuity is to be paid out of the lands merely, without saying by whom, the devisee's estate will not be enlarged; 8 East, 141.

† Where the devisee is directed to pay a gross or yearly sum out of the annual profits, the devisee, it is presumed, takes a fee; 2 Powell on Dev. by Jarman, p. 398, 394, 395.

born of the body of the said H. H., and which shall be living at the time of her decease; if but one, to him or her alone; if more than one, to be equally divided between them, share and share alike. And in case the said H. H. shall have no child or children living at the time of her decease, or such child or children shall happen to die before he, she, or they shall attain the age of 18 years, or be married, then I devise the messuages, lands, &c., before-mentioned unto J. W. and his heirs and assigns for ever." H. H., the second devisee in the will, survived her mother, S. F., the first devisee, and entered into possession of the premises so devised; she married J. H. whom she survived, and by whom she had several children, only one of whom, named C. D., survived her, who married A. B. by whom she had a daughter and only child, who died when she was three years old. Upon the death of H. H. she and her husband took possession of the premises. The question was, whether C. D. as one of the children of H. H., took an estate in fee?

Per Cur. There being no words of limitation, *prima facie* there was no estate of inheritance given by the devise to the children of H. H.; but there being afterwards a proviso, that in case H. H. should have no child or children living at the time of her decease, or that her child or children should die before attaining the age of 18, or marriage, the estate should go to J. W. in fee; it is therefore contended that this child of H. H. who married and survived her mother, took an estate in fee in the devised premises. It is clear that J. W. was not to take any interest, unless the children of H. H. died before 18 or marriage; he is therefore entirely excluded by the facts of this case, and no question arises on the devise to him. As between the children of H. H. and the ultimate remainder-man, there can be no doubt, and if the fee were once given to the children of H. H. it would be sufficient. We are therefore of opinion that H. H. having married and survived her mother, took a fee in the devised premises; and consequently that C. D. and her husband are entitled to take possession.

[238]

2. *DOE, D. WIGHT, V. CUNDALL.* E. T. 1808. K. B. 9 East, 400. S. P. MARR-
SHALL V. HILL. 2 M. & S. 608.

Where, therefore, a person devised to the two children of his brother when they attained the age of 21; but if either should die during minority, then the survivor should be heir to the other; held that the devisees took estates in fee.

A testator devised four houses to two children of A. at 21; but if either should die before 21, then the survivor should be "heir to the other two houses." It was argued, that those children took only life estates in the premises, with a life estate in the whole to the survivor, by force of the devise, "that the survivor shall be heir to the other;" for that whenever the word "heir" is used in a will for the purpose of carrying over an interest which determined on the death of the first taker, the second only takes by way of substitution, and therefore only takes the same interest as the other had. The will too, it was maintained, was inartificially drawn; and the word *heir*, in its popular sense, imported succession, rather than the degree of interest which the person took. The Court, however, held that the children took a fee by implication, by force of the limitation on their dying under 21. See Hob. 75; Freem. 293; 2 Saund. 388. a; Willes, 143; Campb. 353; 3 Burr. 1618; 1 Burr. 234.

(c 1) *From a devise to trustees, for purposes requiring a fee.*

1. *DOE, D. WHITE, V. SIMPSON.* E. T. 1804. K. B. 5 East, 162; S. C. 1 Smith's Rep. 383.

Where the purposes of a trust of property devised may be satisfied by giving the trustees a less estate than a fee, no greater estate shall

A testator devised to three trustees, and the survivor and the executors of such survivor, messuages, &c., and all arrears of rent, and a bond of one of the tenants, for securing such arrears, in trust, that they, out of the rents and profits, should pay certain annuities for lives; and after payment of the annuities, should pay to his brother 800 pounds. And further and after payment of the said annuities and the said sum of 800*l.* he devised the same to his son W. for life; remainder over, for the lives of other persons; remainder to C. W. and his heirs male; remainder to his own right heirs. And he gave to the executors and survivor, and the executors of such survivor, power to grant building leases; and he gave to two of the executors 10*l.* per annum a piece, for so long as they should act in the trusts. The question was, whether the trustees took the legal estate in fee or not?

Per Cur. If the trustees were to take a fee, the bond and judgment, which is devised to them for the same purpose as the profits of the estate, would go to different parties after the decease of the survivor, the one to the personal representative, the other to the heir; but if they take a chattel interest in the rents and profits, then they will both go alike. It has been however urged that the leasing power gives the executors, by necessary implication, an estate in fee. But the testator gives them power to grant leases, as often as there shall be occasion, of the said estates so devised to them in trust as aforesaid, connecting the executing of the power with the estate before given; and also, he seems to have contemplated the execution of the trust, and consequently the estate, as not going further than the life of the trustees; for he gives two of them an annuity of 10*l.* a year, so long as they shall act in the trust for their trouble. Now a yearly allowance to trustees, so long as they shall act, is not very consistent with an estate to the heirs of the surviving trustees, without giving them also a compensation for their trouble. We are, therefore, of opinion that the trustees took an estate by implication for the lives of the annuitants, and for a term sufficient to raise the 800*l.*; and that after those trusts were satisfied the estates to the remainder-man for life and in tail took effect as legal estates. See 8 Rep. 96; Cro. Eliz. 336; 2 Vern. 403; 1 P. Wms. 509. 519; 2 Bro. P. C. 1; 3 id. 453; 8 Vin. Abr. 262; 7 T. R. 654; 1 Bro. Ch. Rep. 74; 2 T. R. 414; Willes, 650. [239]

2. *DOE, D. BUDDEN, v. HARRIS.* M. T. 1822. K. B. 2 D. & R. 36. S. P. *DOE, D. PLAYER, v. NICHOLLS.* H. T. 1823. K. B. 1 B. & C. 336.*

Freehold property was, in this case, devised to trustees, in trust to secure an annuity of 60*l.* per annum to testator's wife for life; and then in trust for his two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they shall severally attain the age of 21 years, and then unto and among them, share and share alike, as tenants in common, and not as joint-tenants. The will then granted a power to the trustees to receive the rents, and to lay out the surplus beyond the wife's annuity, and other charges thereon, in good securities; to grant leases of the estates for a term not exceeding seven years; "and, if they should think it advisable, to sell any part thereof, at any time after my death." The Court held, that this latter clause did not control the express gift of the estates to the children in fee, when they should attain the age of 21 years.

3. *HAWKER v. HAWKER.* E. T. 1820. K. B. 3 B. & A. 537. S. P. *DOE, D. LEE COMPERE, v. HICKS,* M. T. 1797. K. B. 7 T. R. 433. S. P. *SHAW v. WEIGH.* E. T. 1738. K. B. 2 Str. 798. S. P. *DOE, D. PROSSER, v. JENKINS.* M. T. 1754. C. P. Willes, 650. S. P. *WICKHAM v. WICKHAM,* M. T. 1809. K. B. 11 East, 458; S. C. 3 Taunt. 326. S. P. *OATES, D. MARKHAM, v. COOKE.* E. T. 1765. K. B. 3 Burr. 1684. S. P. *HORTON v. HORTON.* E. T. 1798. K. B. 7 T. R. 652. S. P. *DOE, D. HALLER, v. IRONMONGER.* E. T. 1803. K. B. 3 East, 533. S. P. *ROBINSON v. GREY.* M. T. 1807. K. B. 9 East, 1 S. P. *DOE, D. WOODCOCK, v. BARTHOLOP.* H. T. 1814. C. P. 5 Taunt. 382; S. C. 1 Marsh. 90.

A testator by his will devised all his real estates, in several parishes, to trustees, their heirs and assigns for ever, upon trust, to sell his estate at N. to pay his debts and in case it should not be sufficient, then, as to his estate at F., upon trust, to sell that also, to make good the deficiency; but in case it should not be necessary, then as to his estate at F. and his other remaining estates in trust, to receive the rents and profits till his daughter come of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at F. if it should be sold, to his daughter upon coming of age, and from that

* In this case, a devise of copyhold lands in trust for a minor, and to be transferred to him at twenty-one, was held to give to the trustees a chattel interest only, determinable at the majority of the *cestui que trust*, the Court, thinking that the words "to be transferred" did not refer to a legal transfer of the estate by surrender (in which case they must have taken a fee to enable them to make such surrender), but merely to the delivery of possession, and admission on the rolls of the manor.

period to the use of the trustees for the life of his daughter, and after her death to the use of her children; and, by a codicil to his will, in which he made an alteration as to the trustees, the testator devised his estates to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid in trust as aforesaid." It appeared that the estate at N., when sold, was alone sufficient to pay the debts. The Court certified to the opposite side of the hall, that the trustees, and survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estate at F. and elsewhere. See 3 Bro. P. C. 127; 8 Vin. Ab. 262; 5 East, 162; 3 P. Wms. 372.

4. *DOE, D. HURRELL, v. HURRELL.* M. T. 1821. K. B. 5 B. & A. 18.

Which is evidently the only sure mode the Courts have, in such cases, of adhering to what they can reasonably presume was the deviser's intention.

A testator having both real and personal estate, after giving several pecuniary legacies bequeathed all the rest and residue of his estate and effects whatsoever and wheresoever to trustees, their executors, administrators, and assigns, upon trust that they should, out of such residue of the moneys and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession, for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named, and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estates and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters. It was contended, that the testator's real estate passed by the above will.

Sed per Cur. Notwithstanding the generality of the words used, the nature of the trust clearly shows that the testator meant to bequeath his personal property only, for the trustees are directed out of such residue of the moneys and effects to manage the farm for the remainder of his term. Now the real estate was not applicable to such a purpose; for the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects, or such effects as shall be upon his said farm. It appears to us, therefore, that by using the latter word he himself has furnished a comment upon the words, *the residue of his estate and effects*; and that by those words, he meant only such estate and effects as constituted personal property.

5. *DOE, D. TOMKINS, v. WILLAN.* M. T. 1818. K. B. 2 B. & A. 84.

[241] And, for this purpose, no words of limitation are necessary.

A testator devised to trustees, their heirs, executors, administrators, and assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent; to pay one-third of the rents of the freehold estates to his wife for life, and one-third of the personality to her absolutely, and then to lay out the other two-thirds of the personality in the funds, and to pay the dividends and the rents of two-thirds of the freehold estates, and after the death of the wife, the other third of the rent of the freehold estate to his daughter, for her own separate use; and after her death, the freehold estate, and two-thirds of the personal estate, to the daughter's children, to be equally divided amongst them, and to be paid them at the respective ages of 21 years; and if his daughter died without leaving issue, then his freehold estates to his wife for life, and after her death to his heir at law, as if he had died intestate. The Court held, that the trustees took an estate in fee, and that upon the death of the widow, who was the surviving trustee, the legal estate descended to the daughter, and upon her death without issue, vested in the heir at law *ex parte materna*; observing, that they were bound to give effect to the testator's first words, by which he devised his estates unto the trustees, their heirs, executors, administrators, and assigns; which words, in their natural import, gave the fee, and especially as it did not appear from the whole tenor of the will what less estate would satisfy the terms of the will, or the objects which the testator had in view.

6. *MURTHWAITE v. BARNARD.* E. T. 1821. C. P. 2 P. & B. 623.

Where, therefore, there was a direction to

The testator devised real and personal estates to trustees, (after payment of legacies and annuities,) to pay rents, profits, &c. of the residue of his estate to

testator's three nieces, for their lives; their issue to have their parts share as tenants in common for their lives, and if either died leaving no issue, her share to be divided equally between the survivors of all the nieces; and if all nieces *except one should die without issue, such one to have the whole* for her life, and her issue after her, share and share alike; and if but one, that one to enjoy the whole as to the freehold; if more than one, as tenants in common; if only one, to him or her, his or her heirs, &c.; and in case of all dying without issue, remainder to the devisor's next male heir of the same name. One trustee only survived. On a special case, the Court certified that he took a fee simple in the freehold estates devised.

7. *WALTER V. HUTCHINSON*. E. T. 1823. C. P. 5 Moore, 143; S. C. 2 B. & B. 349. Judgment affirmed 1 B. & C. 721; S. C. 3 D. & R. 58.

The testator devised lands, &c. charged with annuities, and subject to certain legacies to trustees, their heirs and assigns, until the devisor's nephew, son of his sister B. should attain 21; and if he should die in the mean time, until C., second son of B. should arrive at that age; and if C. should die in the mean time, until the daughter of B. should attain 21, upon trust, to raise out of the rents of the premises, or by sale or mortgage thereof, portions for C. and the younger children of B. payable on their attaining 21, and further to apply a proper sum out of the rents for the maintenance and education of A. till he should attain 21, and then to pay the residue; and if he should die before 21, then to apply a like sum for the maintenance of C. till he should attain that age, and then to pay him the residue, and in the mean time to place out the money arising from these rents at interest, for the benefit of A.; and when A. should attain 21, or, in case of his death, when and as soon as C. should arrive at that age, or, in case of his death, when the daughter of B. should attain 21, to the use of A. and his assigns for life *sans waste*; remainder to trustees, to preserve contingent remainders; and after the death of A., to the use of his first and other sons, &c. in strict tail; and for default of such issue to the use of C. with similar limitations over to his niece, the daughter of B. and an ultimate remainder to B. in fee. The devisor died leaving his sister B., her sons A. and C., and three younger children alive. A. married and died intestate under 21, leaving a daughter D. The question was, what estate the trustees took under the will. It was contended, that the trustees took a mere chattel interest; for, although the devise is to them, *their heirs and assigns*, it is clear that it was the intention of the testator that they should not have any larger estate than was sufficient to enable them to perform the trusts of the will. In *Cordell's case* (Cro. Eliz. 315.) there was a devise to executors for the payment of testator's debts, and until his debts should be paid; remainder to his brother for life; and after his death the debts were paid, and the question was, what interest or estate the executors had? and it was resolved, that they had but a chattel interest. So in *Doe, d. Lee Comper, v. Hicks*, 7 T. R. 433, where, after a devise to one for life, the devisor limited the estate to trustees and their heirs, in trust, to preserve contingent remainders, and to permit the tenant for life to take profits, with remainder over on his decease; and he afterwards gave other estates for lives, with several remainders over; and after each estate for life he interposed the same estate to trustees and their heirs; it was held, that this showed the intent of the testator to be, that the estates to the trustees should be confined to the lives of the several tenants for lives, and consequently, that those in remainder took legal estates, there being no other circumstances in the will to show a contrary intent. The judges certified, that the trustees took only a chattel interest in the estates devised to them.

8. *HARTON V. HARTON*. E. T. 1798. K. B. 7 T. R. 552.

A special case stated a devise to A. and B., and their heirs, in trust, to permit C. a feme covert, to receive the rents during her life for her separate use; and after her decease to the use of her first and other sons successively in tail male, remainder to the use of her daughters, as tenants in common in tail; and in default of such issue, upon further trust, to permit D. another feme covert, to take rents for her sole use during her life, with the like limitations as before

pay legacies and annuities, and to support contingent remainders if the trustees were holden to take a fee.

It must be however, recollected, that if the testator has used any words of limitation, the quality of the estate will be governed by them, if it be consistent with the purposes of the trust, and the context do not furnish an inference of a contrary intention; (5 East, 162), nor does this case militate against such position, as the whole frame of the will prevented a greater estate vesting in the trustees.

So, if the purposes of the trust cannot be satisfied by an estate for lives, the trustees would be held to take an estate in

[243] to her issue; and afterwards similar dispositions for the benefit of E., another fee-simple, feme covert, and her issue. *Per Cur.* This provision was made to secure a feme covert a separate allowance; to effectuate which it was essentially necessary that the trustees should take the estate with the use executed, for otherwise the husband would be entitled to receive the profits, and so defeat the object of the devise; consequently the legal estate, by way of use executed in fee-simple vested in the trustees.

(d 1) *From the devise of a smaller estate to the heir at law.*†

(e 1) *From a devise to several to be equally divided.*

GOODRIGHT, D. PARRICK, v. PATCH. E. T. 1773. K. B. Loft. 224.

A fee may be implied from a devise to several to be equally divided.

A house was in this case devised to several persons, to be equally divided amongst them. The Court held that such devise passed an estate of inheritance, since, otherwise, the devisees could not take the benefit seemingly intended for them.

(f 1) *From analogy.*

(a 2) *As where a joint devise takes a fee.*

WRIGHT v. BOND. II. T. 1806. C. P. 2 N. R. 125.

A fee may be implied from analogy to the estate limited to a joint devise.

A. B. devised a house to his mother for life, and after her death "to the eldest son of E. K., and if E. K. should have no male heir, then to the eldest son of I. K." He also devised copyhold lands to the eldest son of E. K.; but if the said E. K. aforesaid should have no male heir, "then my will is, that the aforesaid lands and tenements I bequeath to the aforesaid son of I. K., to him and his heirs for ever." But if the said eldest son should offer to sell or mortgage such copyhold lands and tenements aforesaid, then he gave the aforesaid lands and tenements to T. C. in fee. He then gave his personal estate to T. C., directing him "to be at the charges of taking up and admitting the said eldest son as afore-mentioned to the said copyholds, out of the said personal estate, and in the name of the said K." He then gave the rents and profits of the copyholds to T. C. for seven years, and then "to the aforementioned eldest son. But if the said T. C. should die before the end of the seven years, then the aforesaid eldest son of the K.'s to take and enjoy the said estate forthwith to them and their heirs for ever." The Court held that the eldest son of E. K. took an estate in fee under this will in the copyhold premises.

[244] (b 2) *As where an absolute interest is previously given in a chattel interest.*‡

(g 1) *Effect of an alternative devise in fee.*

1. MOONE, D. FAGGE, v. HEASEMAN. II. T. 1740. C. P. Willes, 138.

As to whether a fee will arise in such instances, two cases may be mentioned; first, the case of Moon, d. Fagge, v. Heasman;

Lands were devised to dame M. F. for life, remainder to her daughter S. F. she paying to her two sisters E. and M. 500l. a piece; and if she (S. F.) died, the farm to be divided between the survivors; and, in case all three daughters died before their mother, then to the right heirs of dame M. F. for ever. And the Court held that E. and M. took a fee; "for (said Lord C. J. Willes) if the testatrix intended that the daughters of M. F. should be only tenants for life, and consequently that it should go to the heirs of the mother, whether the daughters died before their mother or not, it would have been most absurd in her to say that it should go to the heirs of the mother, in case the daughters die before her." The Court, however, decided the question principally upon another point.

* With regard to estates limited to trustees to preserve contingent remainders, it may be observed, that, although they are not in terms confined to the life of the person taking the immediately preceding estate of freehold, as is usually the case, yet they will be so confined in construction, if the will disclose no other purpose which requires that the trustees should take a larger estate. Doe, d. Compero, v. Hicks, 7 T. R. 438.

† A devisee will not take a fee without words of limitation, merely from the circumstance that an antecedent estate for life is given to the heir at law. Right, d. Compton, v. Compton, 9 East, 267.

‡ The rule is not, that where a testator, having devised a chattel interest by general words, afterwards devises his lands, without making any alteration in the words, an absolute interest in the lands, the same as in the chattel, should pass, though perhaps it would have been the better way as meeting the intention; 3 M. & S. 529,

2. ROBINSON V. GREY. M. T. 1807. K. B. 9 East, 1.

A testator having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being *feme covert*), and the survivor of them, for their lives, share and share alike; and after their decease, in trust for all and every the *child* and *children* of her three daughters, who should be living at the death of the survivor of them, as tenants in common; but if all her daughters should die, without leaving any *issue*, then, after the decease of the survivor, in trust for her grandson in fee, who was her *heir at law*, the residue of her real and personal estate to her three daughters. The Court certified to the Master of the Rolls that the children of the daughters living at the death of the survivor took *estates in fee*.

See 8 Vin. Abr. 262; 1 Ves. 144; 7 T. R. 654; 5 East, 171; 2 P. Wms. 629; 1 Eq. Ca. Abr. 174; 5 T. R. 553; 6 id. 175. 512; 1 B. & P. 559; 2 id. 247; Doug. 264; 3 T. R. 484; 6 East, 366; 7 East, 521; 2 Saund. 338. a; Willes, 143; 8 East, 141; Fearne's Com. Rem. 554; Com. 299; 3 Atk. 493; 3 East, 516; Com. Rep. 372; 10 Mod. 403; 1 Salk. 24.

(h 1) *Effect of an indefinite devise limited in defeasance of a fee.*

MIDDLETON V. SWAINT. E. T. 1693. K. B. Skin. 339. S. P. BEVESON V.

HUSSEY. id. 385. S. P. ROE, D. KIRBY, V. HOLMES. M. T. 1757. C. P. 2 Wils. 80.

A man devised five shares in the New River to his five children, and their heirs i. e. to H. and his heirs one share, to A. and her heirs another share, and so on to the others; and if any of them died before they attained 21, or were married, that then the share of such child so dying should go to the rest of his said children. H. died under 21, and unmarried, and it was held that the other children took but an estate for life in his share.

(f). *As to whether cross executory limitations can be implied among devisees in fee.*

2. *Estate tail.*

(a) *General rule as to the creation of.*

1. BAKER V. WALL. E. T. 1696. K. B. 2 Ld. Raym. 181. S. P. ROE, D. CLEMETT, V. BRIGGS. 16 East, 406. S. P. DOW, D. ELLIS, V. ELLIS. S. P. 9 East, 382. S. P. GOODRIGHT V. PULLYN. 2 Ld. Raym. 1440. S. P. BADGER V. LLOYD. 1 Salk. 253. S. P. ROE, D. DOBSON, V. GREW. 2 Wils. 322. S. P. DAVIE V. STEVENS. 1 Doug. 321.

A devise run in the following terms: I devise to Daniel, my eldest son, all

† Mr. Jarman (2 Powell, 399 & 402.) observes thus: "the question frequently arises, whether, if lands be devised indefinitely in one event, and for an estate in fee in another, the former devisees takes a fee by implication from the alternative devise. Two decisions but *altho'* (*supra*, p. 244.) may be adduced in favour of this doctrine, but in both of them some stress appears, or may be inferred, to have been placed on the circumstance of the devise in fee being the heir of the testator: yet that, considering the circumstances of the case of *Robinson v. Grey*, and the strong inclination of the courts to favour the enlargement of definite devises, it is probable they would hold, as a general rule, that such a devise, limited with an alternate or substituted estate in fee, does confer an estate in fee by implication.

* The question, whether cross executory limitations can be raised by implication among devisees in fee, arises when land is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other circumstances, in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross remainders among devisees in tail, that the Court will imply reciprocal executory limitations among such devisees. The principal difference between the two cases seems to be this:—In the case of a devise to several devisees in tail, assuming the intention to be clear that the estate is not to go over to the remainder man, unless all the devisees die without issue, the effect of not implying cross remainders among them would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, though the limitation over could not take effect until the failure of all. With respect, however, to limitations in fee of the realty, and of absolute interests in personality (which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest: and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over. To introduce cross limitations among the devisees in such a case would be to divest a clear absolute gift of the testator upon reasoning merely conjectured; 2 Powell by Jarman, 624.

Secondly, the case of *Robinson v. Grey*.

[245]

It has been held that an indefinite devise limited in defeasance of a fee confers only an estate for life.

An estate tail is in general created by means of a limitation to a person and the heirs of his body.

[246] that my farm called Dunsey, to him and his heirs males for ever; if a female, my next heir shall allow and pay her 20 l. in money, or 12l. a year out of the rents and profits of Dumsey, and shall have all the rest to himself; I mean my next heir to him and his heirs male for ever. The Court said, that it was very manifest that the devise to Daniel, the son, was an estate tail male.

2. LORD OSSULTON'S CASE. M. T. 1708. K. B. 9 Salk. 336; S. C. 11 Mod. 189.

Ford being seised in fee, and having issue three sons and a daughter, and having likewise one brother, devised his lands to his eldest son in tail male, and so to the second and third son, remainder to his right heirs male for ever. The three sons died without issue; and the question was, whether the daughter, as heir-general, or the brother of the testator, as heir-male, should have the lands? *Et per Cur.* None shall take by those words "heirs males" but he who is heir male of the body of the testator; for no collateral heir male shall take by such a limitation by way of remainder; for, at common law, if land was given by a common conveyance to one and his heirs males, there the word "males" shall be rejected, for there was no such thing as an heir male, without saying of whose body; and if, by letters patent, lands were limited to W. R. and his heirs male, it is void, though it is otherwise in a will; and the reason is, because in a will the law supplies those words, "of his body," and that makes it a devise to him and the heirs males of his body; for heirs or heir male cannot be a name of purchase, but heirs males of his body may. Therefore if there is no such thing in propriety of speech as an heir male, without saying of whose body, for that reason heir male of his body, or heirs males of itself, where the law will supply these words, "of his body," as it will in a devise, may be a good name of purchase; but yet the party, who would take by such a limitation, must be such a person as may be an heir by the common law, and would take by that name.

3. DOE, D. EARL OF LINDSEY, V. COLYEAR, M. T. 1809. K. B. 11 East, 548. S. P. WHITE V. WARNER. M. T. 1781. K. B. 11 East, 551. n.

Devise to A. for life; remainder to trustees, to preserve contingent remainders; remainder to the first and other sons of A. successively, in tail male; with like remainder to B. and his sons; with remainder to the right heirs male of A. for ever. A died before the testator. The question was, whether the ultimate limitation to A. lapsed by his death?

Per Cur. Where the words of the subsequent devise do not refer to a particular individual, or individuals of the family of the same person, to whom an estate for life is first given, but to a class of persons comprehending all of that class who could claim from, or through him, there they are considered as words of limitation, and not of purchase. But, it is argued, that they cannot be considered as words of limitation in this instance; because the estates before given in succession to all the sons of A. in tail male, would comprehend all the heirs male of the body of A., and therefore, that the ultimate remainder to his heirs male would be inoperative. But that does not follow; for cases may be put, where persons would have taken as heirs male of the body of A., and yet would not have taken under the limitation to his first and other sons in tail male; as, if A. had had an eldest son, who died in the life-time of the testator, leaving a son. for these reasons, we are of opinion that the devise in question lapsed by the death. See 1 Rep. 104; 11 id. 79. b; Plowd. 210; 1 P. Wms. 397; Doug. 323. 337; 2 Ves. 646; 1 Ld Raym. 186; Co. Lit. 24. b. 25. b. b.; Prec. in Ch. 442. 461; Gilb. Rep. 116. 131; 1 Stra. 35; 1 Ves. 337, 338; Cro. Eliz. 576; 1 Taunt. 263.

4. NANFAN V. LEIGH. M. T. 1815. C. P. 7 Taunt. 85; S. C. 2 Marsh, 107.

A. B. devised to testator's wife his cottage, for life, if she continued chaste and unmarried; but, immediately after her death, or marriage, to his son J. H., as soon as he should attain 21, and to his heirs for ever. He also devised his land and estate in fee-simple where he then lived (except what was therein-before bequeathed to his wife) to his son, J. H., as soon as he should attain 21 years, and to his heirs lawfully begotten, for ever, subject to an annui-

[246] that my farm called Dunsey, to him and his heirs males for ever; if a female, my next heir shall allow and pay her 20 l. in money, or 12l. a year out of the rents and profits of Dumsey, and shall have all the rest to himself; I mean my next heir to him and his heirs male for ever. The Court said, that it was very manifest that the devise to Daniel, the son, was an estate tail male.

Or to A. for life; and, after his death, to his heirs male;

Or, to his right heirs male for ever.

[247]

And even a devise to A. as soon as he is 21, and to his heirs lawfully begot

ty of 7l. to his wife. The Court held, that J. H. took an estate tail in the land, and an estate in fee-simple where the testator lived, it being contended, that the first devise to J. H. being to him and his heirs simply, afforded an argument in favour of construing the other devise as giving an estate tail, inasmuch as the testator, in varying the phrase, must have had a different intention. See Gilbert on Devises, 32, 3d edit.; 6 T. R. 352; Doug. 341; 7 Rep. 41; Moore, 637; Cro. Eliz. 178; S. C. Moor. 424.

5. CHAPMAN, D. SCHOLES, v. SCHOLES. M. T. 1771. K. B. 2 Chit. Rep. 643. The devise, the construction of which was now brought before the notice of the Court, was as follows: "And, as touching my real estates, both freehold and leasehold, situate, &c., I devise the rents and profits thereof to my executors, hereafter named, until my daughters attain their several ages of 21 years in trust that they, my executors, improve the same in like manner and purpose as I have hereby directed, my personal estate, for the advantage and education of my daughters. And as to the freehold and inheritance of my real estate, I devise the same to my said daughters, when and as they attain their several ages of 21 years, equally between them and their heirs for ever, to take as tenants in common, provided that, if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said two brothers, T. S. and R. S., and my nephew, J. S., son of my late brother, J., their heirs and assigns, for ever, to take as tenants in common." Under this devise, the Court held, that the daughters only took an estate tail with remainders over.

6. DOE, D. NEVILLE, v. RIVERS. E. T. 1797. K. B. 7 T. R. 276. S. P. CRANE v. JAMES. K. B. Skin. 19.

Testator devised land to his son, A., his heirs, and assigns, for ever; and other land to his son B., his heirs and assigns, for ever; and other lands to his son, C., his heirs, and assigns, for ever, with this express condition, that his son, C., his heirs and assigns, should yearly pay to a grand-daughter of the testator 3l. till her age of 16; and the testator charged the same premises with such payments; and then added, that, if either of his three sons should depart this life without issue of his, or their bodies, then the estate, or estates, of such sons, should go to the survivors, or survivor; and, if all his said three sons should happen to die without such issue, then he devised all the said premises to his four daughters and their heirs and assigns. And he further charged the premises aforesaid devised to C. and his heirs with 40l. to be by him or them paid to his said grand-child. The Court held, that the devise to C. did not give him the fee, but an estate tail. See Cro. Jac. 290. 427. 695. 3 Leon. 130. pl. 183.

7. DOE, D. HATCH, v. BLUCK. H. T. 1816. C. P. 6 Taunt. 485; S. C. 2 Swanst. 170. S. P. TILLY v. COLLIER. H. T. 1676. C. P. 2 Lev. 162. S. P. PARKER v. THACHER. 3 id. 70. S. P. LAW v. DAVIS. M. T. 1731. K. B. 2 Stra. 489. S. P. PRESTON, D. EAGLE, v. FUNNELL. T. T. 1739. C. P. Willes, 164. S. P. GOODRIGHT, LESSEE OF DOCKING, v. DUNHAM. M. T. 1779. K. B. 1 Doug. 266. S. P. MORGAN v. CRIFTHIS. H. T. 1775. K. B. Cowp. 231. S. P. DENN v. SHENTON. H. T. 1776. K. B. Cowp. 410. S. P. DOE, D. HANSON, v. FYLDES. T. T. 1778. id. 833. S. P. DOE, D. COMBERBACK, v. PERLYN. M. T. 1789. K. B. 3 T. R. 491. S. P. IVES v. LEGGE. M. T. 1789. K. B. id. 488. n. S. P. NOTTINGHAM v. JENNINGS. T. T. 1700. K. B. 1 Com. 81; S. C. 1 P. Wms. 23; S. C. 2 Mod. 123; S. C. 1 Ld. Raym. 568. S. P. LEIGH v. BRACE. 5 Mod. 267. S. P. GOODRIDGE v. GOODRIDGE. 7 Mod. 433. S. P. SHAW v. WAY. 8 Mod. 253; S. C. 2 Str. 798.

A. B. devised his lands to his wife for life; and, at her death, to his son, B. and his heirs, for ever; and if B. should die *unpossessed* of them, or *without heirs*, to his daughter C. and her heirs for ever. The Court held, that the word *heirs* must be confined to *heirs of the body*; and, therefore, that B. took an estate tail, with remainder in fee to C.*

* But the courts are not authorised to put this construction on the word *heirs* where the devise over is to a stranger, however probable it may be that it was so intended; 2 Eq. Ca. Abr. 300; 1 Salk. 238; 11 Mod. 207; Willes. 166. n.; 1 Jac. & Walk. 31.

ten for ever, gives an estate tail.

So, a devise to A. and B. on their attain- ing 21, equally be- tween them and their heirs for ev- er, as ten- ants in com- mon, and if A. and B. died with- out lawful issue, then over, was holden to operate as an estate

[248] tail, with reference to A. and B.

So, a de- vise to a person and his heirs; and if he shall die without is- sue;

Or even without heirs; then over; con- fers an es- tate tail.

8. BRICE v. SMITH. M. T. 1736. C. P. Willes, 1.

And a limitation over, to the right heir of the devisee;
[249]

A person gave and devised all his freehold messuages, &c. to his son, P. B., and his heirs, for ever, on condition that he should pay his son, W. B. 30*l.*; and devised estates to his other sons in the same manner. Then followed this clause: "Item, my will and mind is, that, in case any of my said children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him, or them so dying, unto his, or their, right heirs for ever." *Ld. Ch. J. Willes* delivered the opinion of the Court, and said: the question is, Whether P. B., the devisee takes an estate in fee, or in tail; and this is divided into two questions; 1st, Whether he would have had an estate tail, in case the remainder had been devised over to a stranger? 2d. Whether devising it over to the right heirs of the person so dying without issue makes any difference? As for the first question, it cannot be doubted, after so many solemn determinations, that if a man devise an estate to A. and afterwards in his will, give his estate to another, in case A. die without issue, the subsequent words reduce A.'s estate only to an estate tail, and restrain the general word *heirs* to signify only heirs of the body; and this is founded upon these known rules, that the intention of the testator shall always take place in the construction of wills, so far as it can be collected from the will itself, if it be not contrary to the rules of law: and that the priority, or posteriority, of words in a will is not all regarded, but that the whole will must be taken together, to find out the intention of the testator. But, secondly, this distinction was relied on, that, though it have this construction in case the remainder had been devised over to a stranger, it would be otherwise in the present case, because the remainder is devised over to the heirs of the person so dying without issue. This distinction, though it seems at first to be of some weight, when considered makes no difference either in reason or in law. Even in grants, where words are construed much stricter than in cases of wills, if there are words that create an estate tail, the grantee takes an estate tail, though the next remainder is limited to his right heirs. We are, therefore, unanimously of opinion, that the devisee takes an estate tail.*

9. DENN D. SLATER v. SLATER. T. T. 1793. K. B. 5 T. R. 335.

Or, a direction to pay an annuity for the life of the annuitant, will not vary the construction.

The testator devised in these words:—I give and bequeath all my copyhold lands to my nephew, J. S.; but if the aforesaid J. S. shall die without heir male, then my will is, that my nephew C. S. shall enter upon and enjoy the said copyhold lands, his heirs and assigns for ever, provided J. S. pay to his wife E. the sum of 8*l.* a year during her life, with a power of re-entry to the wife if the annuity were not paid: he also devised several legacies. The question was, whether J. S. took a fee by reason of the annuity? It was contended, that the general intent of the testator was to provide for the wife, at all events, for life. Therefore J. S. must take a fee, otherwise that provision could not be entirely secure, for she could only re-enter in case of non-payment by J. S. The right of re-entry is annexed to his neglect only, and the land is not charged in the hands of those who might take in remainder; therefore, to construe the will so as to give him only an estate tail might defeat the principal intent of the testator.

[250]

Per Cur. It is clear, from all the cases on the subject, that J. S. took only an estate tail. In the case of *Blanton v. Stone*, 3 *Mod.* 123, and *Burley's* case, 43 *Eliz.* stated by *Lord Hale*, in 1 *Vent.* 230, which was a devise to A. for life, remainder to the next heir male, for default of such heir male, then over, the court adjudged it to be an estate tail.

10. PLATT v. HOWLES. M. T. 1813. K. B. 2 M. & S. 65.

And it may be here remarked, that if the words of a will be sufficient to constitute a party tenant in ground for denying to a limitation over in these terms the effect of conferring an estate tail, and he by implication.

The reversionary estate in a messuage, &c. was devised to the testator's wife, for the term of her natural life; and, from and after her decease, to the heirs of her body by the testator, lawfully begotten, or to be begotten; and, for want of such issue, remainder over. The wife's husband died. There never

* See 5 T. R. 335., where it was held, that a direction to pay an annuity forms no ground for denying to a limitation over in these terms the effect of conferring an estate tail, and he by implication.

was any issue. She intermarried with defendant, who exercised acts of ownership on the estate by cutting down timber trees, the privilege of doing which was disputed in this action by the remainder-man

Per Cur. The question depends on, whether the defendant and his wife, in right of his wife, were more than bare tenants for life under the will? Now it seems manifest to us, that the wife was tenant in tail after possibility of issue extinct; for although at her husband's death there was, in fact, no issue, yet there was a possibility during the whole period of gestation, that she might have issue. It is the possibility, and not the probability, to which the law looks. During that time, being tenant in tail, she might have recovered the fee by a common recovery. See 11 Rep. 81.

(b) *As to construing particular words, as words of limitation, or of purchase.*

(a 1) *Rule in Shelley's case.*

1. PERRIN v. BLAKE. H. T. 1770. K. B. 4 Burr. 2579. 1 Bl. Rep. 672.

A testator devised that, if his wife should be *ensiente* with a child at any time thereafter (which however never happened), and it were a male, he devised his real and personal estate, equally to be divided between the said infant and his son J. W. when the infant should attain 21; and he declared it to be his intent, that none of his children should dispose of his estate longer than his life, and to that intent he devised all his estate to the said J. W. and the said infant, for and during the term of their natural lives; remainder to J. G. and his heirs, for the lives of the said J. W. and the infant; remainder to the heirs of the bodies of the said J. W. and the said infant lawfully begotten, or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to J. G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of his said daughters, equally to be divided. The question was, what estate J. W. took; and Lord Mansfield, Mr. Justice Aston, and Mr. Justice Willes, (Mr. Justice Yates, dissentiente) held, that J. W. took an estate for life only; but that judgment was reversed by the majority of the judges in the Exchequer Chamber, who held that he was tenant in tail.

* This rule applies as well to equitable as legal interests; 2 Powell, by Jarman, 432. but both must be of the same quality, *id.* The rule has also been applied in the construction of wills of terms of years. Therefore if a term be given to A. for life, and afterwards to the heirs of his body, these words are generally construed to be words of limitation, and the whole vests in the first taker; 8 Vin. Abr. 451. pl. 25. But if there appear any circumstance or clause in the will to show the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor will take for life only, and his heir will take by purchase; *Fearne's Ex. Dev.* 300; 6 *Cru. Dig.* 117.

† Although the limitation be to the heir in the singular number, yet the rule will be applied, and the devisee will be construed to take an estate tail; 1 Vent. 230; 1 *Rel. Ab.* 886; *Bulst.* 219; 2 *Vern.* 314; *Rel. Gav.* 96.

‡ It having been, during the prevalence of the feudal system, a fundamental principle of our law, that an heir should not take a contingent remainder of an estate as a purchaser, where his ancestor took a freehold estate by the same conveyance; because such dispositions, while feuds were predominant, tended to defraud the lord of the fruit of his tenure, by enabling the heir, with the concurrence of his ancestor, to take the estate as fully as by descent, without the feudal burthens to which he would have been liable had the estate descended; it became a rule of construction, applicable to all instruments so conceived, that the estate limited to the heir, though meant to be contingent, should, in law, be considered as vested in the ancestor; in consequence of which conclusion of law, every instrument, in which an estate of freehold or frank tenement was given to the ancestor, with an immediate or mediate remainder thereon limited to his heirs, or heirs in tail, or issue, was considered as furnishing incontrovertible and conclusive evidence of an intent in the donor to give an estate in remainder, immediately executed in the ancestor so taking the freehold, and not contingent in the heir or issue; such a limitation being considered technically as importing an intent in the donor so to convey. And, although, by the abolition of tenures, the foundation upon which the principle was adopted, which gave rise to that rule of construction, failed, yet the technical import of such a limitation being established, the construction of the instrument continued the same, the presumption being that the words were used, notwithstanding tenures had ceased in their common and ordinary acceptation. It followed consequently, that the words "heir," or "issue," when so used in a conveyance, could never take effect as a description of the person to take as a purchaser,

But, although the alteration of the state of the subject to which the words in such a con-

[253] 2. MOORE v. PARKER. E. T. 1695. K. B. Lord Raym. 37; S. C. Skin. 558.
 The limita- A devisor had by indenture settled lands on his son for life, remainder to the
 tion must sons of that marriage successively in tail male, reversion to himself in fee; and
 be created by the same instrument. by will devised the same to the issue of his son by any other wife in tail male.
 It was held that this limitation did not make the son tenant in tail, but gave the
 heirs of the body of the son an estate tail by purchase.

veyance applied, was held not to furnish a reason for altering the construction of such limitations; the language that constituted them having gained by usage a fixed technical import, because such an alteration would have been productive of more mischief by the confusion that would have followed in men's ideas respecting the dispositions of their estates, than could have been compensated for by any benefits that could have arisen by departing from this rule; it by no means followed that, when the foundation of the principle upon which the rule was grafted, failed the rule that had been raised thereupon should be extended beyond the precise limits it had at that time reached. From that period, therefore, courts of law and equity seem to have been as industrious to distinguish cases out of that rule of construction in favour of a contrary intent, where that intent is clear, and must necessarily be collected from the donor's language, as they were astute in their endeavours, by construction, to bring cases within that rule, while the principle of it continued to operate. It follows, that the issue or heir may now take, under that description, contingent remainders as purchasers, notwithstanding a previous freehold is limited to their ancestor by the same conveyance, if there be language so modifying and qualifying the limitation as to make it not quadrate exactly with the rule. But such limitation will conclusively be considered as so doing, unless it be so conceived as necessarily to import an intent in the donor, that his donees in remainder shall take an executory estate, as original purchasers of a contingent remainder, and not an estate in remainder executed through the medium of the ancestor, which it is still concluded to be a donor's intent to give, wherever an estate of freehold or frank-tenement is limited to the ancestor, with an immediate or mediate remainder thereon to his heirs, or heirs in tail, or issue, unqualified with other respective words necessarily importing a different estate to have been intended: 1 Powell, on Dev. chap. vii.

It may be useful, says Mr. Jurman (2 Powell, 455.) as supplementary to the discussion of the rule in Shelley's case, to state, for the use of the student, the practical bearings of the question. Whether the heir takes by descent or purchase? and this may be best shown by suggesting a case of each kind. Suppose then, a devise to A. for life, remainder to the heirs of his body, remainder over; and another devise to the use of trustees for the life of B., in trust for A., remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the heirs of his body can only claim derivatively through him by descent, *per formam doni*; and therefore, if A die in the life-time of the testator, the heir takes nothing, the devise to his ancestor having lapsed; Brett v. Rigden, Plow. 340; Hartop's case, Cro. Eliz. 242; Hutton v. Simpson, 2 Vern. 722; Hodgson v. Ambrose, Dougl. 337; 3 B. P. C. Toml. Edit. 416; Wynn v. Wynn, ib. 95, Warner v. White, ib. 436. On the other hand, in the latter supposed case, if B. died in the testator's life-time, it would not affect his heir, who claims not derivatively through his ancestor, but originally in his own right by purchase; and who would therefore be entitled, notwithstanding his ancestor's death, either before or after that of the testator. In either case he would be tenant in tail, and the estate tail would go by a sort of quasi descent (Mandeville's case, Co. Litt. 26. b; see Fea. C. R. 80.) through all the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker, and then devolving upon the collateral lines; the whole claiming as heirs of the body of the ancestor by purchase, but taking in the same manner as they would have done under an estate tail vested in him. Another distinction to be observed is, that where the heirs take by descent; the property devolves upon him, subject to the dower of the widow of his ancestor, if she were married at his death, and his estate were legal, and not equitable only; or subject to curtesy, if the ancestor were a married woman, who left a husband by whom she had had issue born alive, capable of inheriting, and which attaches whether the estate be legal or equitable. On the other hand, where the heirs take by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being thereby tenant for life. And, lastly; if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor, by common recovery or fine, with proclamations, the right to suffer and levy which are inseparable incidents to an estate tail. On the other hand, the heir claiming by purchase, is unaffected by the acts of his ancestor, except so far as those acts may have effected the destruction of the contingent remainders, if unsupported, as it should always be, by an intervening vested estate of freehold. The recovery, it should be observed, of a person becoming tenant in tail by force of the rule in Shelley's case, under a limitation to the heirs of his body, not immediately expectant on his estate for life, has no effect upon the mesne estates, unless contingent and unsupported. Thus, in the case of a limitation to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A., with remainders over, A. being tenant in tail by the operation of the rule; may suffer a common recovery; but though that recovery will bar the remainders ulterior to the limitation to the heirs of the body, it will not affect the intervening estate of the first and other sons, unless there be no son born

S. HAYES, D. FOORDE, v. FOORDE. E. T. 1770. C. P. 2 Bl. Rep. 690.

F. made his will, having then two sons, R. and W. and a brother N., who had then also two sons, J. and N., and gave his real estate to his eldest son R., at his age of 23, to enjoy the whole during his life." "And the whole estate, of which he is only tenant for life, shall, after his decease, go to his eldest son that shall be then living; and if he dies without any son or sons to enjoy it during their lives (of which none are or shall be tenants, but while they live for the purpose of this rule, to enjoy it), that then it shall come to his brother, W., during his life, and to any of his heirs male during their lives, and no longer; and if they die without issue male, then to the heirs male of my brother N.'s sons, and to any of their heirs male during their lives (of which none of them are tenants any longer, nor shall be in any of their powers to sell, dispose, or make away any part or the whole of it); and, in case they all die without heirs male, then it is to go to the next of kin of mo." At the same time, and with the same solemnities, the testator published a schedule, referred to in the said will, and which the special verdict found to be a part of his will, containing a very particular account of all his real and personal estate; the title to which schedule was in these words, "An account how I dispose of my estate to my son R., as followeth; he paying his mother out of my real estate the sum of 15*l.* per annum during her life, and 24*l.* per annum out of my mortgages, and then all to revert to my son R. during his life; and after his death to his sons; and, for want of sons, to his brother W. during his life, and afterwards to W.'s eldest son; and, for want of his having sons, to my brother N.'s sons; and for want of any sons, to my son's daughters, and so to the next of kin." R. and W., the two sons of the testator, died without issue male; J., the eldest nephew, died before W., the son; and at the time, and no estate interposed to preserve the limitation to the sons in which case it would clearly be destroyed.

It is essential to the operation of the rule in Shelley's case, that the heirs of the body should proceed from the person taking the estate of freehold, and of him only; for if the devise be to A. for life, and then to the heirs of the body of him and another person, who might have a common heir of their bodies, it would be a contingent remainder in tail to the heirs; *Gossage v. Taylor*, Sty. 325; *Fremington, d. Robinson, v. Wharry*, abridged ante, vol. vi. p. 401; 1 Roll. Rep. 238. But, if in such a case, the tenant for life and the other person to whose heirs the limitations are made, are of the same sex, or, not being actually married, are related by consanguinity or affinity, so that they cannot have, or be presumed to have, common heirs of their bodies, the case is obviously different; for, as the testator cannot mean heirs issuing from them both, it is to be read as a limitation to the heirs of the body of A., the tenant for life, and to the heirs of the body of the other person severally; the consequence is, that the former is by the doctrine under consideration, tenant in tail of a moiety; and the heirs of the latter take the other moiety by purchase. *Pari ratione*, if A, were tenant in common with another for life, with remainder, as to the entirety, to the heirs of his body, he would be tenant in tail of one undivided moiety, with a contingent remainder to the heirs of his body in tail in the other. Where the freehold is limited to husband and wife (and the same principle seems to apply in regard to persons capable, *de jure*, of becoming such), with remainder to the heirs of their bodies, the heirs, by the operation of the rule in question, take by descent; see *Roe, d. Aistrop v. Aistrop*, 2 Bl. 1228. But if the estate for life be limited to them successively, with remainder to the heirs of their bodies, the latter devise, it is clear, will operate as a contingent remainder to the heirs as purchasers (*Stephens v. Bretridge*, 1 Lev. 36; *S. C. T. Raym.* 36.)

If the limitation be to husband and wife, and the heirs to be begotten on the body of the wife by the husband, this will be an estate tail in both; *Roe, d. Aistrop v. Aistrop*, 2 Bl. 1228; *Denn, d. Trickett, v. Gillott*, 2 T. R. 431; for, as the heirs are not applied to the body of either in particular, the construction is the same as if it were applied to both; and accordingly where such a limitation was made after an estate for life to the wife only, it was held that she should not take an estate tail; *Gossage v. Taylor*, Sty. Rep. 325. On the other hand, if the devise be to the wife for life, and then to the heirs of her body to be begotten by the husband, she takes an estate tail special, by force of the rule under consideration; *Alpass v. Watkins*, 8 T. R. 516. The distinction is between heirs on the body and heirs of the body. And so, if the limitation for life were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special. But if in the former case supposed, the estate for life had been in the husband, and the latter in the wife, the heirs of the body would have taken by purchase. Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, he becomes, as is well known, tenant in tail after possibility of issue extinct; 2 *Powell by Jarman*, pp. 437 438. 440. 441.

But a will and a schedule to it are considered as one instrument, for the purposes of this rule.

[254]

upon W.'s death, the youngest nephew entered, and suffered a recovery. The question was, whether N., the nephew took an estate for life or in tail under the will and schedule? The Court of K. B. in Ireland was of opinion that he took only an estate for life. Upon a writ of error to the Court of K. B. in England, Lord Mansfield delivered the opinion of the Court, that the only doubt was, whether by the words of the will, N., the nephew of the testator, took any estate by implication. That this doubt was removed by the schedule, which expressly gave an estate to the sons of his brother N.; that therefore N., the nephew, took an estate for life by implication, thus explained, which being conjoined to the estate expressly given to his heirs male, would, by the known rules of law, give him an estate in tail male.—Judgment was given accordingly.

4. COULSON v. COULSON. H. T. 1739. K. B. 2 Str. 1125.

The inter position of an estate to preserve contingent remainders between an estate for life, and the limitation of the heirs of the body.

Bromley being entitled to a reversion in fee in certain lands, expectant upon the death of Elizabeth Foster, devised the same to Robert Coulson for life; remainder to trustees during his life, to preserve contingent remainders; remainder to the heirs of the body of the said Robert Coulson; remainder over. The question was, what estate Robert Coulson took under this devise? and the case having been sent by the Chancellor (Lord Hardwicke) to the Court of K. B., the judges of that Court sent the following certificate:—"We have heard counsel in the question referred by your lordship to us; and as it appears by the state of the case, there is, after the determination of the estate for life of Robert Coulson, a devise to J. B. and R. B., and their heirs, for and during the life of Robert Coulson; we are of opinion that by reason of that remainder interposing between the devise to Robert for life and the subsequent limitation to the heirs of his body, the said Robert took an estate for life, not merged by the devise to the heirs of his body; but by that devise an estate tail in remainder vested in the said Robert.

[255] 5. REX v. MELLING. T. T. 1672. K. B. 2 Lev. 58; S. C. 1 Vent. 225; S. C. 3 Keb. 42.

Or a declaration that the first trustee should have a power of jointuring;

A person devised lands to A. for his natural life; and after his decease, he gave the same to the issue of his body lawfully begotten on a second wife; and for want of such issue, to B. and his heirs for ever; provided that A. might make a jointure of all such premises to such second wife. Lord Hale was of opinion that this was an estate tail in A. and though the three other judges of the Court of K. B. were of a contrary opinion, yet, upon error brought in the Exchequer Chamber, the judgment was reversed, and Lord Hale's opinion established.

6. DENN, D. WRBB, v. PUCKEY. T. T. 1793. K. B. 5 T. R. 299.

Or without impeachment of waste;*

An ejectment brought by the remainder-man disclosed a devise to A. for life, without impeachment of waste, and after his decease to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male for ever; and in default of such issue, to B. and his issue male in like manner, &c. On the death of the deviser. A. entered and suffered a common recovery to the use of himself in fee, and then devised to C. in fee. It was contended that the recovery suffered was void, and a forfeiture of his estate, he being only tenant for life. But the Court, after admitting that it was the testator's intent to give A. only an estate for life, observed, that it was also meant that the subsequent limitations should not take place until all the male descendants of A. were extinct; and that this could not be effected by giving A. only an estate for life, since it would be difficult to extend the subsequent limitations to more than one son of A. who must have taken the absolute interest in the estate. But if these words comprehended all the male issue, as tenants in common in tail, yet, even that would not have answered the deviser's intention, because there were no cross remainders between them. Therefore they were of opinion that A. took an estate tail; but supposing he took only for life, yet, as the remainder to his issue, and the other subsequent ones were contingent, they were barred by A.'s recovery.

* Or for the separate use of the devisee (a feme covert); 8 Vin. Abr. 262. pl. 19; S. C. 3 Bro. P. C. (Tomlin's) 458; 1 Atk. 607.

7. *ROE, D. THONG, v. BEDFORD.* M. T. 1815. K. B. 4 M. & S. 362.

From the report of this case, the following may be collected as the terms of the devise: "To his wife for life; remainder to trustees, &c.; remainder to his daughter for life; remainder to trustees &c.; remainder to the heirs of her body; and for want of such issue, remainder over in fee; it being his will and meaning, that after the decease of his wife, his daughter should have only an estate for life; and that, after the decease of his wife and daughter, the premises should go to, and vest in, the heirs of the body of his daughter; and, for want of such issue, should go over in fee; and that his daughter should not have any power to defeat his intent." The question which arose on this devise was, whether the daughter had an estate for life, or in tail.

Per Cur. By all the cases, as laid down by Lord Thurlow (1 Bro. Ch. Ca. 219.) where the estate is so given, that, after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word "heirs" must be a word of limitation. It seems to us therefore, following the construction of his lordship, that this must be an estate tail in the daughter, in order to effectuate the intention of the testator, which was, that all her issue should take. See 2 Ves. 646; 1 Rep. 164; 2 Atk. 246; 1 Vent. 231; 2 Burr. 1107; Eq. Ca. Ab. 184. pl. 27; 10 Mod. 181; 1 Ves. 142; 1 Bl. Rep. 672; 4 Burr. 2579.

8. *GINGER v. WHITE.* T. T. 1742. C. P. Willes, 348. S. P. *GOODTITLE v. WODHALL.* id. 592. S. P. *GOODRIGHT v. DUNHAM.* M. T. 1779. K. B. Doug. 264. S. P. *REX v. STAFFORD.* H. T. 1798. K. B. 7 East, 521.

A person devised his estate to his son for life; and after his decease, to the male children of the said son, successively, one after another as they were in priority of age, and to their heirs; and in default of such male children, he gave the same to the female children of the said son, and their heirs; and in case the said son should die without issue, then he devised the premises to his grandson in fee. It was resolved, 1st, that the devisee did not take an immediate estate tail by the devise to his male and female children; and, 2d, that, under the words "in case the said son should die without issue," he did not take an estate tail by implication in remainder, after the limitation to his children.

(b 1) *Particular expressions.*†

(a 2) *Heirs of the body.*

(a 3) *General rule, and herein of the effect of words of explanation.*

GOODTITLE, D. SWEET, v. HERRING. H. T. 1801. K. B. 1 East, 264. S. P. *LISLE v. GRAY.* T. T. 1678. K. B. 2 Lev. 223; S. C. T. Raym. 278; S. C. T. Jon. 114. S. P. *GOODTITLE, D. CROSS, v. WODHULL.* M. T. C. P. Willes, 592.

A person devised to trustees to the use of, and in trust for, her sister, M. D., and her assigns, during her natural life, without impeachment of waste; remainder to the same trustees, to preserve contingent remainders; and from and after her decease, then to the use of and in trust for the heirs male of the body of the said M. D., to be begotten severally, successively, and in remainder, one after another, as they or any of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of the body of an estate

* As no declaration, however unequivocal, that the devisee for life shall take for life only, or his estate be subject to the incidents of a life estate, will exclude the rule, so, it is clear, that a declaration that the heirs shall take as purchasers would be equally inoperative to have this effect; see Hargr. Law Tracts, 561. The rule under consideration, applies, where the limitation to the heirs of the body is contingent. Thus, in a devise to A. and B. for their joint lives, with remainder to the heirs of the body of him who shall die first, the heirs would take by descent; see 1 Prest. on Est. 318; 2 Powell, by Jarman. 435;

† In the construction of the various expressions classed in the text, it will be found that the same principle pervades them. and that wherever the word "issue" or "son," has been construed to be a word of limitation (for which, vide post, p. 266, &c., and 281.), and follows a devise to the parent for life, or for any other estate of freehold, he becomes tenant in tail by the operation of the rule in Shelley's case. It is obvious, that in such cases the words in question are construed as synonymous with the words "heirs of the body;" and, consequently, the effect is the same as if those words had been used.

Or that the devisee should have no power to defeat the testator's intent; will not prevent the remainder to the heirs attaching in the ancestor.*

But the rule does not apply to the words "sons" or "children."

[257]

tail, except where the intent of the testator appears so plainly to the contrary, that no body can misunderstand it.

the said M. D., to be begotten severally, successively, and in remainder, one after another, as they and any of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always taken and preferred before the younger of such son and sons and the heirs male of his and their body or bodies; and for want, and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said M. D. to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue, remainder over. The question was, whether the words used in the said devise, relative to the heirs of M. D., were to be viewed as technical terms, or as descriptive of the person or persons to whom the testator intended to give his estate, after the death of the first devisee.

Per Cur. If an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument, an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate tail. But it never has been decided that these words might not be otherwise explained in the will by the testator himself. They were so explained in *Law v. Davis* (Ld. Raym 1561; 2 Stra. 849; and Fitzg. 112.) That was a devise to B. and his heirs lawfully begotten; viz. the first, second, and every other son, successively, lawfully to be begotten, and the heirs of the body of such first, second, and every other son, &c., according to seniority; and in default of such issue, to the devisors' own right heirs. There it was holden that the latter words explained the former; and that B. took only an estate for life, and not in tail. That case was even stronger than the present; for there no express estate for life was given to B., as in this case to M. D. Besides, if the limitation to the heirs male of the body of M. D. is to give her an estate tail, the subsequent limitation to the daughter must be obliterated; for it cannot be contended that those words would give her an estate in tail *general*, but only in tail male. And even if she took an estate in tail *general*, the daughter would take in a different way from what the testator designed; for they were directed to take as tenants in common, which they would not otherwise do, but as coparceners. The words "heirs male of the body" are therefore clearly words of purchase. See *Willes*, 348; 2 *Vern.* 551; *Ambl.* 344; 2 *Lev.* 223; *Pollexf.* 582; 1 *Bro. Ch. Ca.* 206; 1 *Atk.* 246; 4 *Burr.* 2581; 1 *Co.* 104. b.; 1 *Ves.* 142.

[258]

(b 3) *Effect of superadded words of limitation.*

1. *GOODRIGHT v. PULLYN.* M. T. 1728. K. B. 2 Ld. Raym. 1437; S. C. 2 Stra. 729. S. P. *LEGATE v. SEWELL.* E. T. 1706. C. P. 1 P. Wms. 87. S. P. *DENN, D. GEERING, v. SHONTON.* Cowp. 410.

Words of limitation in fee, annexed to the term, heirs of the body, are inoperative to control them.

A person devised to Nicholas Lisle, for his life, and after his decease, to the heirs male of his body for ever; but if the said Nicholas should happen to die without such heirs male, then he devised over. The Court were unanimously of opinion, that this was an estate tail in Nicholas; and that if the subsequent words relied on, as *his*, and *if he died without such heirs male*, were not sufficient to restrain and alter the operation of the words "heirs males," and so qualify them as to make them a description of the person; and that the operation of plain and clear words, and a settled rule of law should not be defeated or broken into by uncertain or doubtful words which they took the last at least to be.

And this rule has not been departed from in later cases.*

2. *MEASURE v. GEE.* T. T. 1822. K. B. 5 B. & A. 910.

A testator devised certain estates to his daughter for life; and after her decease, to her son A. B., an infant, for life; and after the determination of that

* But it seems, that if the superadded words of limitation change the course of descent into another channel, they will convert the words upon which they are engrafted into words of purchase. As in the case of a devise to a man for life, remainder to his heirs and the heirs female of their bodies (per *Anderson* in *Shelley's* case, 1 *Rep.* 91.), and the same principle would seem to apply where a limitation to heirs male of the body is annexed to a limitation to the heirs female; et vice versa.

estate, by forfeiture, or otherwise, to trustees to preserve contingent remainders, but to permit A. B. to receive the profits during his life; and, after the decease of A. B., then to the heirs of his body for ever, with a devise over, in case of the failure of his issue. The Court held, that A. B. took an estate tail in remainder. See 3 T. R. 484; 6 Taunt. 94; 11 East, 668; 1 B. & P. 484; 2 Lord Raym. 873. 1437; Doug. 337; 1 Rep. 93; 2 Atk. 247; 8 T. R. 528.

(c 3) *Effect of words of modification.*

[259]

1. DOE, D. CANDLER, v. SMITH. E. T. 1798. K. B. 7 T. R. 531. S. P. DOE, D. WRIGHT, v. JESSON. Dom. Proc. 2 Bligh, reversing judgment, K. B. 5 M. & S. 95.

W. A. devised to M. A. and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint-tenants; and in case M. A. should happen to die before 21 years of age, or without leaving issue of her body lawfully begotten, then to R. A., his heirs, and assigns, for ever. The question was, whether M. A. took an estate in tail, or for life only.

The Court were of opinion, that M. A. took an estate tail, it being a general rule that, where it appears in a will that the testator had a general intention and a secondary intention, and they clash, the latter must give way to the former. The intent, in this case, certainly was, that M. A. should take only an estate for life, and that her children should take as purchasers; but then it was also meant, that all the progeny of those children should take before any interest should vest in the devisee over; the latter intention, however, could not be effected, unless M. A. took an estate tail.

2. JESSON v. WRIGHT Dom. Proc. 2 Bligh. 1. over-ruling DOE, D. WRIGHT, v. JESSON. E. T. 1816. K. B. 5 M. & S. 95.

A testator devised to W. W. certain premises, for the term of his natural life, he keeping the buildings in tenantable repair: and from and after his decease he devised the same to the heirs of the body of the said W. W. lawfully issuing, in such shares and proportions as he, the said W. W., by deed or will should appoint; and, for want of such appointment, then to the heirs of the body of the said W. W. lawfully issuing, share and share alike, as tenants in common; and, if but one child, the whole to such only child: and, for want of such issue, then over. It was held, by the Court of King's Bench, that W. W. took an estate for life only, with remainder to his children for life, respectively, as tenants in common. Against this judgment, a writ of error was brought in the House of Lords. The principal error assigned was, that the Court below had decided that W. W. took only a life estate under the will, with remainder to his children for life; and that a recovery suffered by him, his wife, and their son, was a forfeiture of their estate; whereas the plaintiffs in error contended that the testator intended to embrace all the issue of W. W., which intention could only be effected by giving W. W. and estate tail. After a very long and able argument at the bar, the House of Lords reversed the decision of the Court of King's Bench.*

* Lord Eldon, in moving the judgment, observed that it is definitely settled as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent. The decision in the court below has proceeded upon the notion that no such paramount intent was to be found in the will. His Lordship then read the devise, observing, that if he stopped at the end of the first devise to W. W., it was clear that he was to take for life only. If at the end of the first following words "lawfully issuing" he would, notwithstanding the express estate for life, be tenant in tail: and, in order to cut down this estate, it is absolutely necessary that a particular intent should be found to controul and alter it, as clear as the general intent here expressed. The words "heirs of the body" will, indeed, yield to a particular intent, that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator, but that must be clear, intelligible, and unequivocal. The will then proceeds, "in such shares and proportions as he, the said W. W., shall by deed appoint." "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession; W. W. therefore could not, strictly and technically, appoint to heirs of the body. This is the power; and then come the words of limitation over in default of execution of the power, "and for want of such gift, &c., then to the heirs of the body, &c., share and share alike, as tenants in common." It

[260] 3. *PIERSON v. VICKERS*. M. T. 1804. K. B. 5 East, 547; S. C. 2 Smith's Rep. 160.

Where, therefore, a testator devised his estates at B. unto his daughter A. and to the heirs of her body, lawfully to be begotten, whether sons or daughters as tenants in common and not as joint tenants; and in default of such issue to D. and E. for life, remainder to trustees to preserve, &c.; remainder to all and every the child and children of D. and E. whether sons or daughters, and their heirs.

[261] It was, on the one hand, urged that, on the authority of *Doe v. Cooper* (1 East 229.) and *Doe, d. Chandler, v. Smith* (7 T. R. 531.) C. took an estate tail, and the words *heirs of the body* passed the estate tail, and the words *whether sons or daughters* meant only to confirm the same intent, and did not convert them into words of purchase. On the other hand, it was urged, that there was no doubt on the first words of the will, that C. took an estate tail, but the next words, *whether sons or daughters*, controverted the construction, and that C. took an estate for life, with remainder to her children as purchasers in fee. The Court certified (the case having been sent from the Roll's Court) that C. took an estate in tail general. See 2 East, 36; 7 T. R. 531; 1 Burr. 38; 2 id. 1100; 1 East, 229; 2 B. & P. 620.

4. *DOE, d. COLE, v. GOLDSMITH*. M. T. 1816. C. P. 7 Taunt. 209; S. C. 2 Marsh, 517.

A testator devised his lands to his son F. G. to hold to him and his assigns for his natural life; and, immediately after his decease, he devised the same unto the heirs of his body, lawfully to be begotten, in such parts, shares, and proportions, manner and form, as F. G. his son, should by will or deed devise or appoint; and in default of such heirs of his body, lawfully begotten, then immediately after his decease the testators devised the premises over to another J. G., in fee. It was held by the Court, that the son took an estate tail, it being the testator's evident intent that the estate should not go over to J. G.,

has been most powerfully argued, that the appointment could not be to all the heirs of the body in succession for ever; and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all times to come could not be tenants in common; that "heirs of the body" in this part of the will must mean the same class of persons as the heirs of the body, among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction, many difficulties have been raised on the other side; as, for instance, how the children would take in certain events, as where some of the children should be born, and die before others come into being. How is this limitation in default of appointment in such case to be construed and applied. The defendants in error contend, upon the construction of the words in the power and the limitation in default of such appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted, that it must be children, because, in the concluding clause of the limitation, in default of appointment, the whole estate is given to one child, if there should be only one. Their construction is, that the testator gives the estate to W. W. for life, and to the children, as tenants in common, for life. How they could so take in many of the cases put on the other side, it is difficult to settle. Children are included, undoubtedly, in heirs of the body; and, if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but because children are included in the words "heirs of the body," it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words "for want of such issue," which follow, it is said, mean for want of children, because the word "such" is referential, and the word "child" occurs in the limitation immediately preceding. On the other hand, it is argued, that "heirs of the body" being the general description of those who are to take, and the words "share and share alike, as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being as they say, the description of an individual who would be comprehended in the terms "heirs of the body for want of such issue," they conclude must mean for want of heirs of the body. If the words "children" and "child" are so to be considered as merely within the meaning of the words "heirs of the body," which words comprehend them and other objects of the testator's bounty, and I do not see what right I have to restrict the meaning of the word "issue," there is an end of the question.

Where, therefore, a testator devised his estates at B. unto his daughter A. and to the heirs of her body, lawfully to be begotten, whether sons or daughters as tenants in common and not as joint-tenants; and in default of such issue, over; the Court held that the daughter took an estate tail. So, where the expression was, "in such shares, &c. as A., (the devisee) should appoint,"

until all the "heirs of the body" of F. G. were extinct. See *Doe, d. Bosnall, v. Harvey*, 4 B. & C. 610.

5. *DOE, D. LONG, v. LAMING*. M. T. 1760. K. B. 2 Burr. 1100. *Scmb. S.* P. DOE, D. BROWN, v. HOLME. T. T. 1771. C. P. 3 Wils. 237; S. C. 2 Bl. Rep. 777.

Lands held in gavelkind were devised to A. C. and the heirs of her body lawfully begotten, or to be begotten, as well females as males, and to their heirs and assigns for ever; to be equally divided, share and share alike, as tenants in common, and not as joint-tenants.

Lord Mansfield said, that the devise could not take effect at all, but would be absolutely void, unless the heirs of the body of A. C. took as purchasers. The lands devised were gavelkind; and it was manifest the testator did not mean that his estate should go in a course of descent in gavelkind; for he gave it to the heirs of the body of A. C., as well females as males; therefore they could not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation; for the testator breaks the gavelkind descent, by giving it to females as well as males. He likewise added, "and to their heirs and assigns for ever, to be divided equally, share and share alike." Nay, he went further, "as tenants in common, and not as joint-tenants." But this could not be, if they were to take in a course of gavelkind descent; for, in such case, they must take as coparceners. Upon the whole, as no man could doubt of the testator's intention, and as this was the only method of effectuating it, and as there was no rule of law that prevented heirs taking as purchasers, where the intention of the testator required it, he was of opinion, that the words "heirs of the body" were words of purchase. Judgment accordingly.

6. *DOE, D. HALLEN, v. IRONMONGER*. E. T. 1803. K. B. 3 East, 533.

Action of ejectment. From this case it appeared that A. B. devised to a trustee and his heirs, upon trust, to receive the rents, and apply the same for the support of C. D. and the issue of her body lawfully begotten, or to be begotten, during the life of C. D.; and, after the decease of C. D., upon trust, for the use of the heirs of the body of C. D. lawfully begotten, or to be begotten, their heirs and assigns, for ever, without any respect to be had or made in regard to seniority of age, or priority of birth; and, in default of such issue, over. C. D. had three children, one son, and two daughters. The son died in her lifetime, leaving several children: and his eldest son (the lessor of the plaintiff), on the death of C. D. claimed the property, as the heir of her body, at her death. *Sed per Cur.* All C. D.'s children were intended to take together, without regard to seniority of age, or priority of birth: that must mean that they should take as joint-tenants. And, as the father of the lessor of the plaintiff died before any severance of the joint-tenancy, his children cannot take. *Posita* to defendant. See 1 Lutw. 823; 2 Ld. Raym. 873; 2 Salk. 679; 8 Vin. Ab. 262; 3 Bro. P. C. 458; 7 T. R. 654; 1 Ves. 142; 2 Atk. 246. 570; 3

* "As to the circumstance of the land, in this case, being gavelkind, which was adverted to by Lord Mansfield, this extraordinary ground of distinction is now overturned by the late case of *Doe, d. Bosnall, v. Harvey*, 4 B. & C. 616., which, it is observable, has all the ingredients that have been relied upon by the judges who decided, or who have cited, *Doe, v. Laming*, viz. that of the land being gavelkind, that of there being words to carry the fee to the children, if the devise had been construed to designate them; and, lastly, the direction that females should take as well as males, and the whole as tenants in common. Under these circumstances, we may reasonably expect never to hear the case of *Doe, d. Laming* again cited as an authority in a court of law;" 2 Powell, by Jarman, p. 475.

† "From the few observations which fell from the Court in the course of the argument, it seems that the judges relied upon the words "without respect, &c. to seniority of age, and priority of birth," as plainly showing that the heirs should take as purchasers, meaning evidently as children, for even as the heirs of the body, they were clearly purchasers, inasmuch as the limitation to the heirs, and that to the ancestor, were of a different quality. Perhaps, it will be said, that this circumstance distinguishes the case from the class of decisions which has fixed the rule of construction under consideration; but it would be difficult to support such a distinction. The words "heirs of the body" are as clear and as well ascertained in the one case as in the other, and therefore, require a demonstration of intention equally clear and unequivocal to control them;" 2 Powell, by Jarman, p. 477.

B. & P. 179; 1 Bro. Ch. Ca. 75; Ca. Temp. Talb. 145. 150; 2 Burr. 1100; 2 Ventr. 311; 1 P. Wms. 14; Cowp. 657; and 2 Atk. 441.

[263] Then came the case of *Strong v. Goff*, in which the devise was to testator's daughter M., and to the heirs of her body, lawfully begotten, as tenants in common, and not as joint-tenants; but if such issue should depart this life before he, she, or they should respectively attain their age or ages of 21 years, then over to testator's son; and in which the Court held the daughter took an estate for life only, with remainder to his children as tenants in common.†

A testator devised one estate to his wife for life; and, after her decease, to his daughter, Mary, and to the heirs of her body begotten, or to be begotten, as tenants in common, and not as joint-tenants; but, if such issue should die before he, she, or they, attained 21, then to his son Joseph in fee; and then he devised another estate to his wife for life; remainder to his son Joseph and the heirs of his body begotten, or to be begotten; but, if he died without issue, or such issue all died before he or they attained 21, then to his daughter, Mary, and the heirs of her body begotten, or to be begotten, such issue, if more than one, to take as tenants in common. The testator died, leaving his widow and his daughter Mary him surviving. Both these parties, in succession, entered and enjoyed the premises devised, and died, Mary leaving daughters, who were the plaintiffs in this action (of ejectment), and a son, who was the defendant; and the question raised was, what estate Mary took in the first estate? It was argued, for the defendant, that it was necessary Mary should take an estate tail, as well upon the legal effect of the subsequent limitation to the heirs of her body, as to effectuate what it was maintained was the general intent of the testator, that no part of the estate devised to Mary and the heirs of her body should go over to her brother, so long as any of her issue were in being, to which the particular intent that her children should take as tenants in common must give way. *Sed per Cur.* Heirs of the body having to take as tenants in common, clearly demonstrate that children were meant, by that description, as heirs of the body would take by succession. This is rendered still more plain by the following words: "that if such issue should depart such life before 21." Who does the testator then mean by such issue, but the persons to whom he had before referred, by the description of the heirs of the daughter's body? And when he is contemplating the possibility that he, she, or they, may depart this life before 21, to whom can he be referring, but the immediate children of his daughter? The obvious intention, therefore, of this part of the will clearly is to give Mary an estate for life, and her children a distinct and independent interest as tenants in common; and, it is too plain to be defeated by a mere conjecture, that the deviser might have a paramount intention inconsistent therewith. Let the judgment, therefore be entered for the plaintiff.

See 2 Burr. 1100; 1 Ves. 142; T. Jones, 119; 9 East, 1. 400; 7 T. R. 531; 1 East. 229; 5 id. 548; 3 B. & P. 620.

8. GRETTON v. HAWARD. M. T. 1815. C. P. 6 Taunt. 94; S. C. Marsh. 9.

[264] So, in the case of *Gretton v. Howard*, under a devise "of all testator's real and personal estate, of what nature or kind soever, to his wife; and after her decease, to the heirs of her body, share and share alike, if more than one; and, in default of issue, to be lawfully begotten by him, to be at her own disposal." A. died, leaving six children. The case of *Doe v. Goff* (11 East, 608.) was cited in argument; and the doctrine of that case, that the testator having given the estate to the heirs of the body, share and share alike, could not have intended an estate tail, under which the eldest son would take the whole, was much relied upon. The Court certified that the wife took an estate for life only, and that each of the six children took a fee-simple in remainder expectant on the determination of the mother's life-estate, in one sixth part, as tenants in common.

his wife, and after her decease to the heirs of her body share and share alike; and in default of issue to be lawfully begotten by him, to be at her own disposal; the wife leaving six children of A.'s at his death was holden to take a life estate.‡

* This case was expressly overruled in *Jesson v. Wright* (2 Bligh. 1), Lord Redeale said: it is impossible to decide this case, without holding that *Doe v. Goff* is not law. Lord Eldon expressed the same opinion. *Doe v. Goff*, said he, is difficult to reconcile with this case.—I do not say impossible; but that case is as difficult to be reconciled with other cases.

† This case was not cited in *Jesson v. Wright*, which accounts for its not having fallen under the censure there applied to *Doe v. Goff*, which it closely resembles; and on the authority.

‡ It will be noticed, that the case of *Doe v. Goff* was cited as an authority; and there-

(b 2) *Children.*

1. SEALE v. BARTER. T. T. 1801 C. P. 2 B. & P. 485. S. P. DAVIE v. STEPHENS. H. T. 1780. K. B. Doug. 321. S. P. FRANK v. STOVIN K. B. 3 East, 548. S. P. WHARTON v. GRESHAM. C. P. 2 Bl. Rep. 10 S. A devise to a man and his children, he

The devise in this case was, "It is my will that all my lands and estates shall, after my decease, come to my son, J. S., and his children, lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper; and for default of such issue, then over in like manner to a daughter. J. S. had no children born at the time of the making of the will, or the death of the testator. The Court of Common Pleas held, that J. S. took an estate tail; Lord Alvanley expressly intimating that the Court gave no opinion as to what would have been the construction, if there had been children born at the time of the devise." [265] none at the time, gives him an estate tail; (Wild's case, 6 Rep. 17.)

2. DOE, D. GIGG, v. BRADLEY. M. T. 1812. K. B. 16 East, 309.

A. B. devised a tenement, of which he was possessed, for the remainder of a term of years to his daughter L. K.'s children, to be equally divided between them, share and share alike, and to the survivor of them and their children. L. K. had two children, J. G., the mother of one claimant, and S. R., who afterwards married the other claimant. Under this limitation it was contended, that the survivor of S. K.'s children, which the mother of one of the claimants was, was entitled to the whole of this estate by way of survivorship; or, if not, that the words "and their children" were words of purchase; and that the grand-children of S. K. were entitled, upon S. K.'s death, to divide the estate *per capita*. *Per Cur.* It seems to us, that the true construction of this will is to treat these words as words of limitation; for, according to the first of which, probably, the translation of heirs into children was considered as almost too clear for argument; 2 Powell, by Jarman, p. 481. In some instances, children have been held to be a word of limitation, notwithstanding the existence of children.

fore, it is now probable that the case of *Gretton v. Haward* would not be at the present day considered a subsisting authority.

It may be here noticed, that, strong as were the observations of the judges in the House of Lords in their decision of *Jesson v. Wright*, and clearly as they seemed to contemplate the respective weight of conflicting decisions, a case (*Willcox v. Bellairs*, Hay's Inquiry, p. 2.) has arisen to the following effect:—A testator devised his lands to his son, H. T. W. during his natural life; and after his decease, to each of his said son's children, and in such shares and proportions as his said son should, by his last will appoint, and to their heirs; and for the want of such appointment, to the heirs of the body of the said H. T. W., their heirs and assigns for ever; and in case his said son should happen to die without issue, then from and immediately after his decease, the testator devised the said estate unto his daughter E. W. for life; remainder according to E. W.'s appointment; in default of which, to the heirs of the body of the said E. W., their heirs and assigns for ever; and in case his son should live, and have children as aforesaid, then he bequeathed unto his daughter, E., a legacy of 500*l.* H. T. W. before issue born, suffered a common recovery. To a title derived under this recovery, it was objected, that H. T. W. was not tenant in tail. The vendor instituted a suit to compel performance. The bill was ultimately dismissed.—An appeal is now pending.

Mr. Jarman (2 Powell, p. 484.), with his usual penetration, has endeavored to assimilate the case in question to *Jesson v. Wright*; and to show that the principle that guided the judges in one, ought to be adhered to in the other case. The only circumstance affording the slightest pretext for distinguishing the two cases are; first; the power to appoint to the children; secondly; the words of limitation annexed to the heirs of the body; thirdly; the devise over "immediately after" the decease of H. T. W.; and, fourthly, the legacy to the devisee in remainder, in case H. T. W. should live and have children as aforesaid.

He then goes on to examine each of them *seriatim*; vide 2 Powell, 486, 487, 488; and adds:—If then each of the circumstances, in which *Willcox v. Bellairs* differed from *Jesson v. Wright*, taken singly, be incapable of constituting a solid distinction between them, it is difficult to ascribe more potency to their conjoint operation.

* It should be observed, however, that, though the terms in which this rule is always laid down, confine it to cases in which the devisee has no children at the time of the devise (an expression which appears rather to denote the time of the making of the devise, than the period of its taking effect), it is impossible not to see that the only period material with reference to its evident intent and object, is the death of the testator, when the will takes effect; 2 Powell, by Jarman, 496.

position, an equal distribution would never be effected, which the words "share and share" import; and, according to the second, the only way, in case of the birth of a third child of W. K.'s before the remainder vested in possession, in which such child and her issue could take in due proportion with J. G. and the other claimant and their issue, is by treating the words "and their children" as words of limitation.

See 6 Rep. 16. b; Str. 1172; 3 Bro. Ch. Rep. 215.

3. *WOOD v. BARON*. H. T. 1801. K. B. 1 East, 259.

Forexam-
ple; under
a devise to
C. of all
the testa-
tor's real
and person-
al property,
as a place
of inherit-
ance, to his
[266]
or her chil-
dren, or his
issue for
ever, A.
was holden
to take in
tail.

A. B. devised to his daughter, C., all his estate and effects, real and personal; and added these words, "who shall hold and enjoy the same as a place of inheritance, to her and her children, or her issue for ever. And if it should so happen that my daughter A. should die, leaving no child or children; or if it so happen that my daughter A.'s children should die without issue, then he directed his estates to be sold." The question for the opinion of the Court was, whether, under the will of the testator, A. took an estate tail or an estate for life only, in the devised premises? It was urged that, although, according to Wild's case, (6 Co. 16.) if there be a devise to one and his issue, or children, and he then have issue living, the issue will take immediately, unless there be a manifest intent to the contrary to be collected from the whole will; yet that that only held where the estate is given to the children by express words; whereas, in the case before the Court, the gift was to A. alone, "who shall enjoy the same, as a place of inheritance to her and her children," &c.; that there was, therefore, an express estate of inheritance given to her; besides which the general intent of the testator would be defeated, if the children took any estate; for, as there were no cross remainders given, and they could not be raised by implication between more than two, the remainder over would take effect, on the death of one of them, in disherison of the rest of A.'s issue. The Court afterwards certified that A. took an estate tail.

See 3 T. R. 143: 4 id. 82; 7 id. 531. 589.

(c 2) *Children and posterity.*

ROE, D. EBERALL, v. LOWE. T. T. 1790. K. B. 1 H. Bl. 416.

The words
"children
and posteri-
ty" in a de-
vise, pass
an estate
tail.

The testator devised that "the rent of certain copyhold lands being 11l. per annum, should never be improved or raised, but should continue at 11l. per annum; and that the said R. W., who was then tenant; and his children and posterity which should succeed, should never be put forth or from the same, but always continue the possession of the said copyhold premises." The question was, what estate passed to R. W.? *Per Cur.* The words "to his (R. W.'s) children and posterity who should succeed," must confine it to an estate tail. An estate to a man and his children, if he have none born, is an estate tail, according to Wild's case; 6 Co. 16 b. Posterity goes still further: it is an exclusion of collateral heirs, and must cut off the fee-simple by necessary implication.

(d 2) *Issue.* (a) (3) *General rule.*

1. *DENN, D. WEBB, v. PUCKEY*. T. T. 1793. K. B. 5 T. R. 305. S. P. LUDINGTON v. KINE. 1 Ld. Raym. 207.

The word
issue, is ei-
ther a word
of pur-
chase, or of
limitation,
as will best
suit the in-
tention of
the deviser.

A devise was made to A. for life, without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male for ever; and, in default of such issue male, to B., &c. The Court held that A. took an estate tail; and said; in addition to the cases already mentioned, we will refer to another, *Doe, d. Brown, v. Holme*, 2 Bl. Rep. 777; where the devise was to "J. L. for life, and after his decease to the heirs male or female of the body of J. L. for ever;" and J. L. not having had any issue, suffered a recovery. Lord C. J. de Grey, who delivered the opinion of the Court, said, "that *quacunqve via data*, the recovery vested an estate for life, with remainder in fee to his heirs, male or female, then being a contingent remainder it was destroyed by the common recovery; and all the subsequent remainders depending thereon were barred, according to the case of *Loddington v. Kine*; Salk. 224. To that case, which is very much like the present, and which was much investigated, we subscribe.

[267]

2. *DOE, D. BLANDFORD, v. APPLIN.* M. T. 1790. K. B. 4 T. R. 82.

In this case there was a devise to A. for life, and after his decease to and amongst his issue, and in default of issue, then over. A. was holden to take an estate tail. Grose, J. said, "there is no case in which 'issue' has been determined to be a word of purchase, unless coupled with other words expressing such an intent; but here the contrary intent appears."

and where that intention is not manifest, it is a word of limitation.

(b 3) *Exemplifications of the rule.*

1. *REX v. MELLING.* M. T. 1672. K. B. 1 Vent. 225; S. C. 2 Lev. 58. S. P.

SHAW v. WEIGH. E. T. 1730. K. B. 2 Stra. 798; S. C. 3 Mod. 253.

A testator devised lands to A. for life, and, after his decease, he gave the same to the issue of his body lawfully begotten on a second wife; and for want of such issue to B. and his heirs for ever, provided that A. might make a jointure of the premises to such second wife, which she might enjoy for her life. Twisden and Rainsford, Jrs. held it to be an estate for life in A., in opposition to Hale, C. J., who delivered an elaborate and argumentative opinion in favor of an estate tail, which construction was afterwards adopted by all the judges in the Exchequer Chamber, reversing the judgment in the Court of King's Bench.

A devise to A. for life; and after his death to his issue; operates as an estate tail.*

2. *WHITELOCK v. HEDDON.* E. T. 1798. C. P. 1 B. & P. 243.

A testator devised "all his freehold, leasehold, &c. estates" to A. in fee, provided, that if B. should have any son or sons, then "to such male issue as B. should have when A. attained 21;" but A. to have the rents and profits of the estates till he attained 21. By a subsequent clause, he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to A. his heirs, &c. for ever." B. had one son, who died before A. attained 21; and a second, who was born three weeks after that period. The Court held that the first son took nothing, but that the second son took an estate in tail male; and said, that as the objects were the sons of the testator's son, who appeared, were to have his bounty, in preference to the son of his daughter (for such A. was); and that as "issue" was a collateral term, capable of being descriptive of either person or interest, or both, they thought it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate tail male to the sons of B., as many as there should be, in order of succession.

So, it would seem that a devise to the issue of A. would carry an estate tail to the persons from time to time being heirs of the body of A.

So, under a devise to A. his eldest son, and

3. *DANSEY v. GRIFFITHS.* E. T. 1815. K. B. 4 M. & S. 61. S. P. *GOODTILE, D. PEAKE, v. PEGGDEN.* M. T. 1788. K. B. 2 T. R. 720.

In this case there was a devise of lands to A., his eldest son, and his heirs; but if it should happen that A. should die and leave no issue, then to his son B. and his heirs; and if he should die without issue, then to his son C., &c. The Court certified that A. took an estate tail.

[268] his heirs, but if A. should die and leave no issue, or ver, a takes an estate tail.

4. *GLOVER v. MONCKTON.* C. P. 3 Bing. 15. S. P. *EASTMAN v. BAKER.* H. T. 1808. C. P. 1 Taunt. 174.

Real estate was devised to trustees, upon certain trusts, until the testator's son should attain 21, and when he should arrive at that age, in trust for him, his heirs, &c.; but in this case his said son should not live to attain such age of 21 years, and his daughter should be living at the time of the decease of his said son, or in case his said son should live to attain such age, but should afterwards die without lawful issue, then in trust for the daughter for life, with remainders over. The son attained 21, and the Court of Common Pleas, upon a case from the Court of Chancery, certified that he took an estate in fee, with an executory devise over in case of his dying without having issue living at his death.

So the words "in default of issue," "without issue," &c. preceded by a devise to a person indefinitely or expressly for life, will

enlarge that devise to an estate tail; unless there be ground for restraining it to issue living at the death;

5. *REX v. THE MARQUIS OF STAFFORD.* T. T. 1806. K. B. 7 East, 521. S. P.

DOE, D. COMBERBACH, v. PERRY. M. T. 1739. K. B. 3 T. R. 484. S. P.

DOE, D. TOOLEY, v. GUNNIS. E. T. 1812. C. P. 4 Taunt. 313. S. P.

DENN, D. BRIDDON v. PAGE. K. B. 8 T. R. 87. n.; 11 East, 603. a.

* And, it has been ever held, that a devise to A. and his issue living at his death, creates an estate tail in A.; 1 Ed. 473.

Or, there be an intermediate devise to some class or denomination of issue, to which they are to be referred.

A testator having an only child R., who was married and had three children, T., R., and A., devised his copyhold to R., his daughter, for life; remainder to his grand-daughter R. for life; remainder to trustees, to preserve contingent remainders; remainder to the use of the issue of the body of his grand-daughter R., in such parts, shares, and proportions, manner and form, as she should by deed or will appoint; and, in default of appointment, to the use of all and every the children of his said grand-daughter, and their heirs, as tenants in common; and, in default of such issue, to the use of all and every the other children of his daughter R., and their heirs, as tenants in common, &c.; and, in default of such issue, to his own right heirs. The testator's daughter, and his grand-daughter R., died without any appointment, the latter having an only child. The question was, whether, on her death under age, and unmarried, the premises descended to her heir at law, or whether the subsequent limitation to the other children of the testator's daughter R. took effect.

[269]

Per Cur. There can be no doubt but that the words, according to the common and ordinary legal use of them, most distinctly give a fee. For the devise is in these terms: "To the use and behoof of all and every the children of my grand-daughter R., and their heirs; and, in default of such issue, to the use of all and every the other children of my said daughter R.," without any thing being expressly said as to the time of the failure of such issue. And it is but by inference from the limitation over, being in default of issue, that it is construed that the testator meant his other grand-children should take, if the children of his grand-daughter R. should die during their minority. Besides, the devise to the children of the testator's grand-daughter is in default of the execution of a power of appointment given to the mother, enabling her to appoint the estate "to the use and behoof of the lawful issue of her body, in such parts, shares, and proportions, manner and form," as she should by will or deed direct. This, in the course of the argument, was said to be only a power to appoint to his children in tail; and, if that were so, it would furnish an inference that the limitations which were to take place, in default of appointment, were intended to be of the same nature. But we think, that the devise gave a power to appoint in fee; for whatever doubts may, from some of the expressions exist, yet the addition of the words *manner and form*, must be given effect to; and, to do so, something more must be understood than merely a power of an equal division of an estate, to be limited in a certain course of descent; and, if they do mean any thing beyond a power of division, they must import a power of determining the nature and quantity of the estate the issue should take. And, as under this power the issue of R. might, according to what must be taken to be the intention of the testator, have had estates in fee given to them, how can we say that by alimination, which was meant as a substitution for the execution of the power, the testator did not intend to give as large an estate, in all respects, as could be appointed under the power? and it is most rational and natural to conclude that he so intended. The whole argument in this case has rested in erroneously applying the words "in default of such issue" to the children of R. and their issue. These words had reference to the children. See Doug. 264; 3 T. R. 484; 6 East, 336.

6. DOE, D. PHIPPS, V. MULGRAVE. T. T. 1793. K. B. 5 T. R. 320.

For where testator devised in trust to A. for B., and his sons in tail male; and, on failure of such issue, to C. without impeachment of waste; it was held

A. B. having an only daughter and three brothers, devised his estate, in trust, for his first and every other son in tail male; and on "failure of such issue, to my brother H. and his first and every other son in tail male;" and so on to his two other brothers, in the same words; and then to his daughters in same manner; and concluded with these words. "in all the foregoing cases, without impeachment of waste, other than wilful;" then, after making a provision for his daughter to the amount of 20,000*l.*, the will proceeded thus: "My issue of such will is, that the money lodged at C. to pay for the purchase of the tithe rectory, be applied to that purchase as soon as Sir J. S. can complete the title, and the renewals to be made by the tenants for life." It appeared that Sir J. S. held the rectory of Lyth for three lives, under the see of Canterbury. For the plaintiff it was contended, that the defendant only took an estate for life, with

remainder in tail male to his issue. For the defendant it was insisted, that he took an estate in tail male, whether the words "first and every other son" be taken as words of limitation, or of purchase. [270 | that B. took an estate for life, and not in tail.

Per Cur. This will is an epitome of a strict settlement; the whole is inaccurate; for the deviser begins with giving his estates, not to trustees, but in trust to persons; and there is no limitation at all to their heirs. The deviser first devised to his own "first and every other son in tail male, &c." Now if he had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, these are precisely the terms in which he would have given such instructions; and, in construing wills, we must take into consideration the short hints of the deviser, in order to discover his intention. We have no doubt but that he meant to give his estate in strict settlement; and when once we know his meaning, we must endeavour to give effect to it. That he intended that the first taker should only have an estate for life is evident. It is not, indeed, an express devise for life; but the clause respecting the renewals by the tenant for life, shows that he meant that the brothers should be tenants for life. It is fair to put the construction on it for which the plaintiff contends,—that it must refer to the testator's brothers; for the renewals were to be made upon the extinction of lives then in being, which might probably happen in a short time; and if they were not to take for life, there could be no tenants for life for many years to come in all reasonable probability.

7. *Doe, D. LIVERSAGE, v. VAUGHAN.* H. T. 1822. K. B. 5 B. & A. 464; S. C. 1 D. & R. 52.

A testator bequeathed a burgage tenement to his nephew, A. B., for life; and from and after his decease, to all and every the child and children of A. B. lawfully begotten, or to be begotten, whether sons or daughters; they, if more than one, to take as tenants in common, in equal shares and proportions; and for want of such issue, to his own right heirs, for ever. The right to an estate tail was claimed on the behalf of the children of A. B.

Sed per Cur. We are of opinion that, by this will, A. B. took an estate for life; and that his children only took estates for life as tenants in common. It may be admitted, that a devise to a man and his children may, in some cases, give an estate tail, if it can be collected that such was the intention of the testator. But it is clear in this will, that the testator did not use the words "child or children" in that sense; for he speaks of them as son and daughters, which shows that he only contemplated the immediate descendants of A. B.; and he gives them an estate as tenants in common. Nor do the words "for want of such issue" carry the matter further; for they only refer to the words "child or children." We think therefore, that neither expressly, nor by implication, did an estate tail pass by this will. See 6 Co. 16. b.; Doug. 431; 7 T. R. 534; 4 T. R. 82, 737; 1 East, 229; 1 Vent. 225; 2 B. & P. 458; 3 Wils. 245; 3 East, 548; 2 Vernon, 545; 1 B. & A. 703; 2 East, 51; 11 id 594; 3 T. R. 83; 5 M. & S. 95; 1 Ves. jun. 236.

8. *FOSTER v. LORD ROMNEY.* M. T. 1809. K. B. 11 East, 594. S. P. DENNE, D. BRIDDON, v PAGE, M. T. 1783. K. B. 11 East, 603. n.

A testator devised one of three estates to trustees and their heirs, until his nephew, Thomas, son of his brother William, should attain 21, or die; and on his attaining 21, to the said Thomas, for life, without waste; and after the termination of that estate to the trustees during Thomas's life, to preserve contingent remainders, &c. And after the decease of Thomas, to all and every the son and sons of the body of Thomas, severally and successively, one after another, in priority of birth, &c.; and, for default of such issue, to the trustees, until his nephew John, son of his brother Samuel, should attain 21, or die; and, in case John attained 21, then to him for life, without waste; and after the termination of that estate, to the trustees, during John's life, to preserve contingent remainders; and after his decease, to all and every the son and sons

* *Sed vide* Wight v. Leigh (15 Ves. 564.) There, a testatrix devised all her real estates, in Surrey, to her husband, J. C., in case he survived her, during his life; and, after

So, a devise to the children of A. B., law fully begot ten, &c., sons or daughters, if more than one, to take as tenants in common, in equal shares and proportions; and, for want of such issue, to testator's own right heirs for ever, was holden to confer on A. B.'s children an estate for life. [271 | So, under a devise to A. for life, and after his decease, to his sons successively; and in default of such issue, the sons were holden to take only for life.*

of the body of John, severally and successively one after another, in priority of birth, &c.; and after the determination of that estate (or as it stood in the limitation of one of the other estates, "and, for default of such issue,") to the trustees, until his nephew S. W., should attain 21, or die &c.; and so repealing all the former limitations, as to S. W. and his sons; and the like with respect to a fourth nephew, F. W. and his sons; concluding, *and, for default of such issue*, to the testator's brother, Joseph, for life, without waste: and after his death, to his son Joseph, and his heirs. The testator repeated the same set of limitations twice more, with respect to two other estates, only varying the priority of his four first-named nephews in the disposition of them; but concluding, after each set of limitations to those four nephews, with the same devise to his brother Joseph, for life; and to Joseph's son, in fee. The nephews, Thomas (the heir at law) and S. W., had issue male, after the testator's death, but none of the nephews had any son born during the testator's life-time. Upon a case sent out of Chancery, for the opinion of the Court of King's Bench, they certified that the four first-mentioned nephews took only estates for life, respectively, for want of words of limitation, or other tantamount words; the words "for default of such issue" meaning, for default of *son or sons*, &c.

See Moor. 337. 682; 9 Rep. 127; 1 Vent. 231; 3 T. R. 83; 8 id. 116: Vaugh. 261: Skin. 385.

[272]
So, in this case, the words "in default of such issue," were construed as meaning "if there should be a failure of issue."
9. GOODRIGHT v. LLOYD, v. JONES. E. T. 1815. K. B. 4 M. & S. 88.
A testator devised a certain messuage, &c. to his wife and daughter E. jointly, during his wife's life: and from and after her decease, to the use of E. for life: and from and after her decease, to his first and every other son, according to seniority; and for want of such sons, to his daughter, or daughters, to be equally divided; and if there should be no more than one daughter, to her use; *and in default of such issue* of his daughter E. to his daughter M. for life; then to her first and every other son, subject to the like restrictions and limitations; and for want of such, to his daughter C., for life (remainder in like manner;) *and for want of all such issues*, to his own right heirs, for ever. The Court held that the remainder to M. and her children, was not a contingent remainder, defeasible by the event of E.'s dying and leaving a daughter, in whom the estate vested; but that such remainder took effect in the children of M., upon the death of the daughter of E.

But in one instance, the words "such issue," preceded by a devise to first and other sons and their heirs, were held to be referrible to the heirs of the sons.
10. LEWIS, D. ORMOND, v. WATERS. E. T. 1805. K. B. 6 East, 336.
Ejectment. The following facts appeared:—A. B. devised to C. the testator's eldest son, for life; remainder to trustees, &c.; remainder to the first and other sons of his said eldest son and their heirs; and for want of such issue, to the testator's second son, D. &c.; with like remainders to his first and other sons; and for want of such issue, to A. B.'s own right heir, D. C. had a son, who died in his life-time, who also himself ultimately died, leaving no son, but leaving daughters, one of whom is the wife of defendant. D. died, but had a her husband's decease, she gave the said Surrey estate to the plaintiff; and, after his death, she gave the same to his first and other sons; and, in default of male issue, then she gave the said estates unto the eldest and other daughters of the plaintiff, and to their heirs male, forever, on condition that they should take the name of W., and no other. The plaintiff, who had a son and three daughters, claimed an immediate estate tail; against which, however, it was contended that, by giving the father an estate tail, the Court would expunge the limitation to the first and other sons, which was a *descriptio personæ*, as much as a limitation to an existing son by name, pointing also to that order in which estates are usually limited, with a view to succession, according to priority of birth; and the words "in default of issue male" might be applied, not to the plaintiff, but to the immediate antecedent, the first and other sons, a construction more grammatical, more consistent with the general plan of the devise, and approaching as near as could be to the ordinary language and course of settlement. But, Sir W. Grant, M. R. decided that the plaintiff took an immediate estate tail. Upon this case Mr. Jarman (2 Powell, 550.) observes: assuming Wight v. Wright to be (as it was treated) a case in which the sons took estates for life only, for want of words of limitation, it presents a distinction, compared with Foster v. Romney (11 East, 594. *supra*, p. 271.), which deserves attention. There, the words "in default of such issue," following a similar devise, were held to mean such sons: here, the words, "in default of male issue" (without the word "such"), referred to failure of issue.

son (the lessor of the plaintiff;) and the question was, whether he took the estate under A. B.'s will; or whether the daughter of C. came in in preference which had been argued at the trial when the verdict had been given for the plaintiff. *Per Cur.* The limitation "to the first and other sons" imports, that they were to take *successively*, according to priority of birth. It is the abridged language of conveyances. And thus the words *for want of such issue*, referring to the antecedent limitation to the first and other sons of C. and *their heir*, will give them estates tail, according to all the cases, and will vest the remainder in D., the brother of C.: consequently, the *postea* must be delivered to the plaintiff. See 8 Vin. Abr. 50; 3 Wils. 244; Willes 353; 1 P. Wms. 76; 2 Stra. 729. 849; 3 Burr. 1582; 3 T. R. 488; Litt Rep. 159. 253; Cro. Car. 363; Fearn's C. R. 514; Cro. Jac. 415; 3 T. R. 488. n. Doug. 264; 1 B. & P. 254. n; and 4 T. R. 484.

It is also established, that words importing a failure of issue, with the word *such*, following a devise to [273].

11. GINGER, D. WHITE V. WHITE. T. T. 1742. C. P. Willes, 348.

A testator devised a certain house to his son J. (subject to an undivided interest given to another child during widowhood); and, after the determination of that estate, he devised the same to the male children of J., successively, one after another, as they should be in priority of age, and to their heirs; and in default of such male children, he gave the same to his female children and their heirs; and, in case the said J. should die without issue, then over to testator's grandson, J. W. and his heirs. One of the questions was, whether the words "in case J. died without issue" did not give him an estate tail by implication? And the court held, that they did not. Willes, C. J. said, that the word "issue" meant such issue as he had mentioned before, and he could mean no other, for he had devised the estate before to all his sons and daughters.

children for an estate of inheritance, refer to the objects of that devise, and not to issue generally; as where it is followed by a devise to children in tail;

12. GOODRIGHT, D. DOCKING V. DUNHAM. M. T. 1779. K. B. Doug. 264.

A person devised a house to his son for life, and after his death to all and every his children equally, and to their heirs; and, in case he died without issue, he gave the premises to his daughters. It was admitted that the son took an estate for life only.

So, where they followed a devise to children in fee.*

13. DOE, D. BEAN V. HALLEY. M. T. 1798. K. B. 8 T. R. 5. S. P. EVANS

D BROOKE V. ASTLEY. M. T. 1765. K. B. 3 Burr. 1570.

The testator devised to his nephew, A. B., and his assigns, for, and during his natural life, without impeachment of waste; and after his decease, to the eldest son of the said nephew, A. B., lawfully to be begotten, and to the heirs of such eldest son, upon condition that such eldest son be christened and called by the name of F.; and, in default of such issue of his said nephew, then over to his nephew B., and his heirs in like manner. A. B. entered, and died without ever having any issue male. The question was, as to what estate A. B. took!

But where these words follow a devise to sons it seems that if the land is devised only to a certain number, and then over, in case the parent shall die without issue male, these words are not referential, but create an

Per Cur. It is certain that the deviser intended that A. B. should take an estate for life at least, with a contingent limitation to his eldest son and his heirs; and, in default of issue male of his nephew, then over. The nephew A. B. never having had issue, that remainder never took place, and it was as if it never had existed, and then the sentence of the will runs thus: "To A. B. for life; and, in default of issue of his said nephew, then over," which gives an estate tail by implication. It appears plainly, from the whole tenure of the will, that the testator's predilection was for the family of A. B. and that he did not mean that the family of B. should take any thing but upon failure of issue male in the family of A. B., that this construction will best support the general intention of the testator. The case that has pressed most on us is that of *Lodding-ton v. Kerrie*, 1 Ld. Raym. 203; but, in deciding this case, we desire it to be

[274]

* And, in such case, if the testator go on to limit the land over, in the event of the issue dying without issue, the estate of the children is, by those words, reduced to an estate tail; Doe, d. Barnard, v. Reason, cited 3 Wils. 244; Southby v. Stonehouse, 2 Ves. sen. 611; Smith v. Horlock, 7 Taunt. 129. In *Ives v. Legge* (3 T. R. 488. n. a.), this construction was given to the words "in default thereof," following a devise to children in fee. It was held to refer both to the children and the heirs of the children; and, as to the devisee over was the uncle of the children, the word "heirs" was read, heirs of the body; 2 Powell, by Jarman, 528.

implied estate tail in remainder in the parent.*

understood as not breaking in on the authority of that case at all, the present being quite different. The case of *Robinson v. Robinson*, (1 Burr. 38. is an important decision in that case. The first limitation was to L. H. for life, and no longer; nothing, therefore could be more clear, than that the deviser only intended to give him an estate for life; yet, seeing that that particular intent was inconsistent with the deviser's general intent, which was, that the whole line of male heirs of L. H. should take, the court thought that they ought, in conscience and in law, to effectuate that general intent. The case was a stronger one than the present; for, by our decision here, we shall not violate any particular intent of the deviser. We are, therefore, of opinion, from the case cited, on a general principle, that A. B. takes an estate tail by implication.

(c 3) *Effect of words of limitation.*

1. *DOE, D. DODSON V. GREW*. H. T. 1767. C. P. 2 Wills. 322; S. C. Wilm. 272. *Semb.* overruling *BACKHOUSE V. WELLS*. 1 Eq. Ca. Ab. 184. pl. 27.

It is clear too, that *issue* is not converted into a word of designation, by the addition to it of words of limitation descriptive of heirs of the same species as the issue described.

A testator devised unto his nephew, G. G., for his natural life; and, after his decease to the use of the male issue of his body lawfully to be begotten, and the heirs male of the body of such issue male; and, for want of such male issue, then over. The court of C. P. held that he took an estate tail. *Wilmot J.*, said, that the intention certainly was to give G. G. an estate for life only; but his intention also was, that, as long as he had any issue male, the estate should not go over, (or rather, that the issue should take in;) and, if we balance the two intentions, the weightiest is, that all the sons of G. G. should take in succession. *Clive, J.*, said, that too great a regard had been paid to the superadded words "heirs male of the body of such heirs male." *Bathurst, J.* laid it down as a rule, that, where the successor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation, *Gould, J.* observed, that the word "issue" is used in the statute *De Donis* promiscuously with the word "heirs;" that the term "issue" comprehends the whole generation as well as the word "heirs;" and, in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

[275]

2. *FRANK V. STOVIN*. E. T. 1803. K. B. 3 East, 548. S. P. *DENNE, D. WEBB, V. PUCKEY*. T. T. 1793. K. B. 5 T. R. 299. *Sid ride* *LODDINGTON V. KIME*. M. T. 1694. K. B. 1 Salk 224; S. C. Lord Raym. 203.† S. P. *DOE, D. COOPER, V. COLLIS*. T. T. 1791. K. B. 4 T. R. 294.

It is also established, that the addition of a limitation to the heirs general of the issue, will not prevent its operating to give an estate tail as a word of limitation.

A. B. devised to A for life, *without impeachment of waste, and with a power of jointuring*; remainder to the issue male of A's body, and their heirs; and in default of such issue to B. for life, without impeachment of waste, and with power of jointuring; remainder to the issue male of B's body, and their heirs for ever; with a proviso that in case A. or B. should become possessed of any other estate, and be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of the estates should go to the other of his nephews; remainder and residue of the testator's estates to A. in fee. A. had issue and afterwards suffered a recovery. The Court were of opinion, that the case was governed by the decision of *Roe v. Green*, 2 Wils. 322; and accordingly that A. took an estate tail. See 5 T. R. 299; 2 Wils. 322; 2 Lev. 58; 1 Vent. 224; 2 P. Wms. 471; 2 Ld. Raym. 874; 1 Burr. 38; 4 id. 1929; Doug. 326; 4 T. R. 82. 294; 7 id. 534; Salk. 224; 2 id. 570; 19 Ves. 73; 9 Price, 556; 1 Meriv. 688

* But, it seems to be established, that, when the words importing a failure of issue are preceded by a devise to *all* the sons in succession in tail, they are merely referential to those objects; 1 P. Wms. 54. 760; 2 Vern. 427. 444; 1 Eq. Ca. Ab. 183. But a different construction of an executory trust prevailed in the subsequent case of *Allanson v. Clithero*, 1 Ves. jun. 24. where the preceding trust embraced all the sons of a *particular marriage* only; 1 Ves. jun. 24. And, even in the case of executory trusts, words importing a failure of issue following limitations in favour of all the *sons and daughters* in tail, will be construed to refer to the objects of those limitations; 1 P. Wms. 600; 5 Madd. 90; 2 Powell, by Jarman 544.

† This case was, however, decided on its own special grounds.

(d 3) *Effect of words of modification inconsistent with an estate tail.*

1. *DOE, D. DAVY, V. BURNSALL.* M. T. 1794. K. B. 6 T. R. 30; S. C. C. P. 1 B. & P. 215

A person devised to his niece, M. O., and the issue of her body, lawfully to be begotten, as tenants in common, if more than one; but in default of such issue, or being such, if they should all die under the age of 21, and without leaving lawful issue of any of their bodies, then over. The Court of K. B. held that the niece only took an estate for life.

repugnant. In the case of *Doe, d. Davy v. Burnsall*, words of modification, inconsistent with an estate tail, have been engrafted on an immediate gift to A. and his issue.

2. *Doe, d. Gilman, v. Elvey.* M. T. 1803. K. B. 4 East, 313; S. C. 1 Smith's Rep. 94.

A testator devised his real estate to his wife for life; and after her decease, to his son, H. G. and to the issue of his body, lawfully begotten, or to be begotten, his, her, or their heirs, equally to be divided if more than one; "and if my said son, H. G. shall have no issue of his body, lawfully begotten, living at his decease," then to the defendant in fee. H. G. survived the testator's widow, and before he had any issue suffered a common recovery. The Court considered the case as falling within *Doe v. Burnsall* (6 T. R. 30), for that was a devise to one, and the issue of her body, as tenants in common, if more than one; and in default of such issue, &c. then over; and this is a devise to one, "and the issue of his body, and his, her, or their heirs, equally to be divided if more than one;" and if the first taker has no issue, then over. It is in effect therefore a devise to the issue of the first taker as tenants in common; and the first taker having no issue born at the time, he suffered a recovery. Then *quacunq;ue via data*, that is, whether H. G. took for life or in tail, the title under the recovery was good, the remainders in the former case being contingent, and consequently destroyed by it. See 2 Saund. 388; Rep. Temp. Hard. 259; 3 T. R. 763; 5 id. 299; Salk 224; Lord Raym. 203; 3 Wils. 237 and 241; 3 Bro. Ch. Ca. 82; Cro. Jac. 415; 3 Lev. 70; 1 P. Wms. 23; Salk. 224.

3. *MEREST V. JAMES.* E. T. 1820. C. P. 4 Moore, 327; S. C. 1 B. & B. 481.

The testator devised certain freehold and copyhold lands and messuages at H., W., and S. to trustees, to the use of his daughter E. A. P. for life; and after her decease, then to the use of the issue of her body lawfully begotten; and in default of issue or in case none of such issue live to attain the age of 21 years, then the lands at H. were given to his brother S. for life; and after his decease, then to the use of the issue of his body; and in default of issue, or in case none of such issue lived to attain the age of 21 years, then the lands at H. were given to his brother S. for life; and after his decease then to the use of the issue of his body; and in default of issue, or in case none of such issue lived to attain the age of 21 years, then to the devisor's brother H. for life; and after his issue then to E. A. P., her heirs and assigns for ever; and as to the lands at W., upon the death of E. A. P. without issue, or if issue, and they should not attain the age of 21 years, as aforesaid, then to his brother H., his heirs and assigns; and after the death of E. A. P. without issue, as aforesaid, all the messuage at T. to his sister E. A. P., her heirs and assigns. E. A. P.

* The solitary ground, in this case, for diverting the word "issue" from its established signification, seems to have been the devise over, in case of their dying under 21, which is precisely the circumstance that both Lord Eldon and Lord Redesdale, in *Jenson v. Wright*, 2 Bligh, 28, held to have been improperly allowed to control the construction of "heirs of the body," in *Doe, v. Goff*, 11 East, 669; and Lord Redesdale strongly denied that such a limitation over was inconsistent with the construction of an estate-tail in the prior devise. In order, therefore, to support the case of *Merest v. James*, it would be necessary to encounter, not only the authority of *Doe v. Applin*, and *Doe v. Cooper*, refusing to expressions inconsistent with an estate tail the effect of varying the construction of the word *issue*, but also the high authority alluded to, denying that the expressions in question have any inconsistency. In every point of view, therefore, the principle of the decision is untenable. It should be observed, that it was decided between the period of the determination of *Doe v. Goff*, in the Court of King's Bench, and that of its being over-ruled in the House of Lords; 2 Powell, by Jarman, 525.

The Courts have not been uniform in rejecting such inconsistent provisions as now under consideration as

So, where there was a devise to A., and the issue of his body and their heirs, equally to be divided; if none, then over; A. was considered as taking for life at least, with a contingent remainder in fee to his issue, if any.

So, under a devise to E. for her natural life; and, from and after her death, to the use of the issue of her body; and, in default of issue, or their attaining the age of 21, then over; E. was held to take an es

married the plaintiff, and they having entered into a contract for the sale of the property so devised, a question arose as to their title. On a bill filed for a specific performance, a case was sent for the opinion of this Court, as to what estate E. A. P. took in the freehold and copyhold premises respectively named in the devise? For the plaintiff it was said, it must be admitted that in the first instance, he contemplated giving his daughter an estate for life only; but his further intention was to provide for her issue, as long as there should be issue proceeding from her, and not to give the estate over until such issue should be totally extinct. If a life estate only be given, that intention will be defeated, and the effect will be to give her an estate for life, and her issue a like estate; nothing being devised from which any thing beyond such an estate can be inferred. That would be attended with this consequence, that taking in the remaining words "or in case none of such issue live to 21," if the immediate issue of E. A. P. should marry and then have issue, and die before arriving at that age, such issue must be excluded, as there is nothing to carry the estate beyond the first taker. The fair inference to be drawn in this case is that the testator intended to provide for his daughter, and her issue was to continue the estate in the right line, before it should go over to the more remote descendants; and although in terms he has only given a life estate to his daughter, the first taker, and nothing more than a life estate to her issue; and although he has made no provision for an event which might happen, namely, that she might have issue, who might die before 21, still it was his manifest intention that an estate tail should be given to his daughter E. A. P., by which according to the doctrine laid down in *Roe, d. Dodson, v. Grew*, 2 Wils. 322; and *Doe, d. Cock, v. Cooper*, 1 East, 229; it was held that where there are two apparent intentions in a will, viz. a general and a particular intent, and both cannot be carried into effect, the latter must give way to such general intent, which in this instance, was to give an estate tail rather than for life.

For the defendant, it was contended that according to legal principles, E. A. P. took an estate for life, with a contingent remainder to her issue in fee, as joint tenants, determinable by executory devise over, in case none of such issue should attain the age of 21. It has been said, however, that there are no words of limitation to give a larger estate to the children of E. A. P. than a life interest. Admitting that there are no words of limitation as to what estate the issue of E. A. P. was to take under the will, it is quite clear that the primary object of the testator was, that his daughter should not be empowered to defeat the estate of his issue, by disposing of it in her life-time, which she might do, if she can be deemed to take an estate tail; and there is no other way of preserving it and protecting her issue, than by giving her an estate for life only. The cases of *Roe, d. Dodson, v. Grew*, and *Doe, d. Cock, v. Cooper*, merely establish that where there is a general and particular intention apparent on a will, the latter must be sacrificed to give effect to the larger and more general intent. In the latter case, the Court could not carry into effect the particular intent of the testator, by giving an estate for life, but they were under the necessity of giving the first takers an estate tail, in order to effectuate the general intent, and leave the rule of law untouched. Besides, both these cases turned on grounds wholly different from the present; as here, the children of E. A. P. would be entitled as joint tenants, and not as tenants in common.

The certificate of the judges was, that E. A. P. took the beneficial interest in the freehold and copyhold premises for her life only; and therefore that the premises contracted to be sold were vested in the devisees, in trust, as therein

So, where property was devised to A. for life, and, after his death, to his eldest or any other son after

4. SEAWARD *v.* WILLOCK. E. T. 1804. K. B. 5 East, 198; S. C. 1 Smith's Rep. 390.

A. B. devised certain lands, after the decease of a tenant for life, to C. D. for life; and, after him, to his eldest or any other son after him, during his natural life; and, after them, to as many of his descendants, issue male, or as should be heirs of his and their bodies, down to the tenth generation, during their na-

tural lives. The question was, what species of estate C. D. took; whether [278] for life or in tail? It was contended, that the general intent of the testator required that he should take an estate tail.

Sed per Cur. This is not the case of a general intent in favour of the issue, which could only be effectuated by giving the devisee an estate tail, and to which the particular intent of giving him only an estate for life must give way; but a single intent to create a succession of estates for life, not warranted by law. See 4 Leon. 124; 1 Rep. 6 b.; 6 id. 16 b.; Willes, 348. 592; 6 T. R. 213; 1 Burr. 38; 2 Ves. 225.

5. *DOE, D. BLANDFORD, v. APPLIN.* M. T. 1790. K. B. 4 T. R. 82.

A. devised an estate at Alhampton, to W. D. for life; and after his decease to and amongst his issue; and in default of issue, over. It was held, that W. D. took an estate tail. Lord Kenyon and Mr. Justice Buller reasoned much upon the words limiting the property over, though the latter admitted that, in rejecting the words "and amongst, they went beyond any of the preceeding cases. Mr. Justice Grose, however, referred the decision to the broad (and, it is conceived, the true) ground, that the word "issue" was a word of limitation, and was different from children, the learned judge citing the declaration of Rainsford, J., (Finch, 282.) "that the word 'issue' is *ex termini nomen collectivum*, and takes in all issues to the utmost extent of the family, as far as the words 'heirs of the body' would do.

6. *DOE, D. COCK, v. COOPER.* H. T. 1801. K. B. 1 East, 229.

A. devised a messuage and land to A. B. for the term only of his natural life; and, after his decease, he gave and devised the same unto the lawful issue of the said A. B. as tenants in common; but, in case the said A. B. should die without having lawful issue, then, and in such case, after his decease, he gave and devised the same to C. D. in fee. It was contended, that A. B., the devisee, took only an estate for life, and that his issue took estates tail as tenants in common, with cross remainders; that the intent of the testator was express, that A. B. should take "for the term only of his natural life;" and that although there being no words of inheritance added to the limitation to his issue, they would, in the first instance only, take estates for lives by implication; yet, inasmuch as the remainder over was only to take effect upon the dying of A. B. without leaving any issue; and, as the issue were to take as tenants in common, and not in succession, in order to effectuate the intention of the testator, cross remainders must be raised between the issue.

The Court said, that it had been the settled doctrine of Westminster Hall [279] for the preceding forty or fifty years, that there might be a general and a particular intent in a will; and that the latter must give way, when the former could not otherwise be carried into effect; that this doctrine had been confirmed by the cases of *Robinson v. Robinson*, 1 Burr. 38; *Roe, d. Dodson, v. Grew*, 2 Wils. 323, and others; that perhaps the Court would but fulfil the particular intent of the testator in this case by giving A. B. only an estate for life; but the general intent was, that all his issue should inherit the entire estate before it went over; and that intent could only be answered by giving him an estate tail, by implication, from the subsequent words, "in default of his leaving issue;" and observed: the principal part of the plaintiff's argument is founded upon the raising of cross remainders, by implication, between the issue of A. B.; but it is a settled rule that they shall not be implied between more than two, unless such appears upon the face of the will to have been the intention of the testator; but no such intent appears in this case from the words of the will; nor can it be implied merely from the circumstance, that the remainder over was not to take effect, but upon the dying of A. B. without leaving issue. Judgment was given accordingly. See *Cro. Jac.* 655; *Cowp.*

* So, where a testator devised to his grandson, J. F., and to the issue of his body lawfully to be begotten, and to the heirs of such issue, for ever, chargeable with a mortgage; but, if his said grandson, J. F., should die without leaving any issue of his body lawfully begotten, then over; Sir J. Leach, V. C., held it to be an estate tail in J. F.; 2 Bligh 59. n.

797; Ambl. 665; 5 T. R. 430; Pollex. 425; T. Raym. 452; 4 T. R. 710; 2 Burr. 1100; 1 B. & P. 221; 7 T. R. 531; 2 Str. 969.

7. LIND V. MURTHWAITE. M. T. 1823. 2 B. & C. 359; S. C. 3 D. & R. 764. overruling S. C. 2 B. & B. 623.

So, the limitation to issue being expressly for life, was held by the K. B. overruling the judgment of the C. P., not to preclude the construction of an estate tail.

Devise of real and personal estate to trustees, to pay rents, profits, &c. of the residue of his estate to the testator's three nieces, for *their lives*; their issue to have their parent's share as tenants in common for their lives; and, if either died leaving no issue, her share to be divided equally between the survivors; if all the nieces, except one, should die without issue, such one to have the whole for her life, and her issue after her, share and share alike; and if but one, that one to enjoy the whole as to the freehold; if more than one, as tenants in common; if only one, to him or her, his or her heirs, &c.; and, in case of all dying without issue, remainder to testator's next male heir of the name. On a case from the Court of Chancery, the Common Pleas certified, that the nieces took estates for life. But the Court of K. B. notwithstanding that certificate, certified that they took estates tail; because it was evidently the intent of the testator, that no part of his estates should go over until after a general failure of the issue of his nieces, which intention must be given effect to by implication; and the words *for life* must be supposed to have been used by the testator, not to describe the quality of the estate which he gave, but as conveying an unnecessary intimation of the length of time for which each generation was to enjoy the property; and where such words are inconsistent with an estate clearly given, they must be rejected as repugnant.

[280]

(e 3) *Effect of words of addition or explanation.*

1. DOE, D. BARNFIELD, WETTON M. T. 1800. C. P. 2 B. & P. 324.

A devise will always be affected by words of addition or explanation.*

An estate was devised to "S. S., her heirs and assigns, for ever; but if she should happen to die, leaving no child or children, lawful issue of her body living at the time of her death, then to F. B. and his heirs." The Court held that the whole fee being given to S. S., her heirs and assigns, no further remainder over could be limited upon that fee; and therefore, the estate given to F. B. was a new fee, limited upon a contingency, that is, an executory devise.

2. PORTER V. BRADLEY. E. T. K. B. 1789. 3 T. R. 143.

Thus, under a devise to A. and his heirs for ever; but, in case he should die leaving no issue *be hind him*, the Court held that these words imported a dying without issue living at the death.†

On a feigned issue, it appeared that testator devised to his son, A. B. his heirs and assigns, for ever, a messuage, &c.; but in case A. B. should happen to die, leaving no issue behind him, then the testator's wife was to receive the rents and profits as long as she should continue a widow; and after her decease, or marriage, then the lands so devised to A. B. as aforesaid, he devised the same, for want of issue by him, unto his son J. D. his heirs and assigns, for ever; but in case J. D. should happen to die before A. B. and the said A. B. should not leave any issue of his body begotten, then his will was, that his said lands should be sold, and equally divided between his six daughters. The testator died; then J. D. died, and afterwards A. B. died, without having had any issue. On a case reserved for the opinion of the Court the question was, what interest A. B. and the six daughters respectively took under the limitation

* As, where (*Mandeville v. Lackey*, 3 Ridg. P. C. 352; *Hayes*, Inq. 148. n.) a testator devised his real estate, in certain counties, to E. K. during his life only, subject to a certain condition, and, after the determination of that estate, to the said E. M.'s lawful issue male, and the lawful issue male of her heirs, the eldest always of such sons of the said E. M. to be preferred before the youngest, according to their seniority in age, and priority of birth; and, for want of such lawful issue in the said E. M., over: the Court of King's Bench, in Ireland, was of opinion, that E. M. took only an estate for life, which was affirmed in the House of Lords, with the unanimous concurrence of the judges, on the ground that, the word "issue" was explained to mean "sons." The Lord Chancellor said: the subsequent words of explanation seemed to him to point out the sons of E. M., by name, as the persons whom he meant by issue male.

† And it may be here concisely stated, as a general rule, that upon the question of whether the term "issue," is to be referred to an indefinite failure of issue, or only to a failure of issue living at the death, depends the operation of such expression to confer an estate tail, for it is only when it receives the former construction that it creates such an estate.

in it? *Per Cur.* A. B. took an estate in fee simple; but as he died without issue living at the time of his death, we think that the further disposition, made by the testator in that event is good by way of executory devise.

3. *ROE, D. SHEERS, V. JEFFERY.* E. T. 1798. K. B. 7 T. R. 539.

The testator devised a dwelling house to his grandson, T. T., and his heirs, for ever. But in case his said grandson should depart this life, and leave no issue, then his will was, that the said dwelling house, &c. should be and return to E., M. and S., or the survivor or survivors of them, share and share alike. The question was whether T. T. took an estate tail, or a fee defeasible on the event of leaving no issue at the time of his death.

So, a similar construction was adopted, where ulterior limitations operated to confer estates for life only.*

Per Cur. Nothing can be clearer, in point of law, than that if an estate were given to A., in fee, and, by way of executory devise, an estate was given over, which might take place within a life or lives in being, and 21 years and the portion of a year after, the latter was good, by way of executory devise. The question therefore is whether, from the whole context of the will, it can be collected that, where an estate was given to A. and his heirs for ever; but, if he died without issue, then over; the testator meant dying without issue living at the death of the first taker; that the rule was settled so long ago as the reign of James I. We therefore think that the devise to E. M. and S. is good by way of executory devise. See 3 Atk 419; 1 P. Wms. 193; 2 Vern. 606; 1 Eq. Ca. Abr. 202, pl. 22; 2 id. 559, pl. 11; 1 Lev. 35.

4. *DOE, D. SMITH V. BEBBER.* T. T. 1818. K. B. 1 B. & A. 713. S. P. DOE, D. KING V. FROST. K. B. 3 B. & A. 546.

In this case there was a devise of real estate to testatrix's neice, M. H. her heirs, executors, administrators, and assigns, for ever; and, in case her neice, M. H., should happen to die, and leave no child or children, then, as to two tenements, remainder over, paying the sum of 1000*l.* to the executor or executors of M. H., or to such person as M. H. by her will should appoint. The court held that such remainder was to be construed as if the devise over had been "in case M. H. should die, and leave no issue;" and that the event on which a devise over of a part was to take place, was evidently intended, from the personal provision to her executors, to be confined to a failure of issue at M. H.'s death. That, therefore, M. H., in the first instance, took a fee, and that such estate was not, by the limitation over upon the failure of issue at the time of her death, to be narrowed into an estate tail, so as to create a contingent remainder; but that the event of a failure of issue at the time of her death not being too remote, the devise over was a good executory devise, and barred by the recovery which it appeared had been suffered by M. H.—See Cro. Jac. 593; 7 T. R. 489; 3 T. R. 146; 17 Ves. jun. 479; 6 Co. 17. b; 1 Vent. 231; 1 P. Wms. 534; 663; 1 Doug. 321; 9 Ves. jun. 203; Ca. Temp. Hard, 258; 12 East, 261.

So, the circumstance of the property being in the devise over charged with sums of money, to be disposed of by the will of the first devisee, will render the words a dying without issue, at testator's death.

2. *Son.*

1. *ROBINSON V. ROBINSON.* M. T. 1756. X. B. 1 Burr. 33. S. P. BLACKSTONE V. STONE. Skin. 269.

The testator devised his real estate to L. H., for and during the term of his natural life, and no longer, provided he altered his name and took that of Robinson, and lived at his house at B.; and, after his decease, to such son as he should have, lawfully to be begotten, taking the name of Robinson; and, for default of such issue, then over to W. R. in fee; and after willing, that W. R. might present whom he pleased to any vacancy in any of the testator's presentations during his W. R.'s life, and that bonds of resignation should be given in favour of W. R.'s children, who were designed for holy orders; and, after the same should be disposed of as aforesaid, then he gave the perpetuity of the presentations to the said L. H. in the same manner and to the same uses as he had given his estates. The court of K. B., on a case sent to them by Lord Hardwicke, certified their opinion, that L. H. must, by necessary implication, to effectuate the manifest general intention of the testator, be construed to take in tale male.

The word son has been, in some instances construed as a word of limitation; which is always its effect where used as synonymous with male issue.

* But all the ulterior estates must be for life; for, in *Barton v. Salter* (17 Ves. 479), the Court refused to extend it over to a bequest of personal estate, where one of the several legatees took a life interest, and the other an absolute interest.

2. *DOE, D. PHIPPS v. MULGRAVE*. T. T. 1793. K. B. 5 T. R. 320. S. P. *HAY v. COVENTRY*. 3 T. R. 86. S. P. *DOE, D. BLANDFORD v. APPLIN*. 4 T. R. 82. S. P. *DENN, D. WEBB v. PAUKEY*. T. T. 1793. K. B. 5 id. 303. S. P. *DOE, D. CANDLER v. SMITH*. E. T. 1798. K. B. 7 id. 533. S. P. *DOE, D. BEAN v. HALLEY*. M. T. 1798. K. B. 8. id. 5. S. P. *DOE, D. COCK v. COOPER*. H. T. 1801. K. B. 1 East, 235. S. P. *MELLISH v. MELLISH*. 2 B. & C. 520.

But the expression is, in general, a word of purchase.

Per Cur. The words "first and every other son," may be taken as words of limitation, where it manifestly appears that the deviser intended to use them in that sense, but, generally speaking, they are words of purchase.

(c) *In what cases implied.*

1. *WALTER v. DREW*. 1 Com. 372. S. P. *GOODRIDGE v. GOODRIDGE*. M. T. 1744. K. B. 7 Mod. 453; S. C. *WILLES*. R. 369. S. P. *BLAXTON v. STONE*. H. T. 1687. K. B. 3 Mod. 123. S. P. *EVANS v. ASTLEY*. M. T. 1764. K. B. 3 Burr. 1570. S. P. *RICHARDSON v. CHILCOTT*. Cart. 165. S. P. *WILSON v. DYSON*. T. Raymond, 425. S. P. *HOLMES v. MEYNELL*, id. 472. S. P. *PITT v. PELHAM*, T. Jon. 25. S. P. *FRIEND v. BOUCHIER*, 2 Show. 405. S. P. *WALTER v. DREW*, 1 Com. 372. S. P. *MOOR v. PARKER*, 4 Mod. 317; S. C. 1 Ld. Raym. 37; S. C. *Skin*, 558. S. P. *PRICE v. WARREN*, id. 266. S. P. *WEALTHY D. MANLEY, v. BOSVILLE*, Ca. Temp. Hardw. 258. S. P. *DUBBER v. TROLLOP*, id. 160.

An estate tail may be created in a will by mere implication, without any express words of devise.

R. W. having two sons, Richard the elder, and William the younger, devised in these words: "It is my will, that if Richard, my son, shall happen to die, and leave no issue of his body lawfully begotten, that then and in that case, and not otherwise, after the death of the said Richard, my son, I give and bequeath all my lands of inheritance in L. unto the said William, my son, to have and to hold the same, after the death of the said Richard, to him and his heirs." Adjudged by Baron Price that Richard took an estate tail by implication.

[283]

2. *ROBINSON v. ROBINSON*. M. T. 1756. K. B. 1 Burr. 38. S. P. *DOE, D. BLANDFORD, v. APPLIN*. M. T. 1790. K. B. 4 T. R. 82. S. P. *DOE, D. CANDLER, v. SWIFT*. E. T. 1798. K. B. 7 id. 531. S. P. *DOE, D. COCK, v. COOPER*. H. T. 1801. K. B. 1 East, 129.

So, an express devise, it has been seen, to a person for life may be enlarged by subsequent words, or by a necessary implication, into an estate tail.

G. Robinson devised a real estate to *Launcelot Hicks*, for and during the term of his natural life, and no longer, provided he altered his name, and took that of *Robinson*, and lived at his house at *B.*; and after his decease, to such son as he should have, lawfully to be begotten, taking the name of *Robinson*; and for default of such issue, then he bequeathed the same to his cousin, *W. R.*, and his heirs for ever. Upon a bill to establish this will, and to carry the trusts of it into execution, *Sir Joseph Jeckyll* declared, that *Launcelot Hicks*, alias *Robinson*, was entitled to an estate for life; and that the remainder would go over to *W. R.* On an appeal from this decree, *Lord Talbot* affirmed it, as to the interest which *L. Hicks* took in the testator's estate under his will, by a declaration in the very words of the former decree. *Launcelot Hicks* had two sons, *George*, who died an infant, and *Edmund*, who filed another bill against *W. R.* the devisee in remainder, and the trustees, for an execution of the trust of the will. *Lord Hardwicke* ordered a case to be made for the opinion of the Court of K. B. upon the following question: Whether any and what estate or interest in the premises in question, did, by virtue of the said will, vest in the said *Edmund*? The Judges certified their opinion, that upon the true construction of the will, *Launcelot Hicks* must be construed to take an estate in tail male, he and the heirs male of his body taking the name of *Robinson*, notwithstanding the express estate devised to the said *L. Hicks* for his life, and no longer.*

* The cause coming on to be heard, on this certificate, before the Lords Commissioners, they confirmed it. On an appeal to the House of Lords (3 Bro. P. C. 180,) it was argued on behalf of the appellant, that the greatest difficulty occurring in the construction of wills was, to form a true judgment where the presumed general intent of a testator ought to prevail, and where the legal operation of his words should take place. If the intention could be collected clearly from plain decisive evidences, such as had been received and allowed in

3. *GOODRIGHT, D. HOSKINS, v. HOSKINS.* H. T. 1808 K B 9 East, 306. [284]

A testator bequeathed unto his son A. certain leasehold premises called R., to hold the same unto his said son A. until his (A.'s eldest) son B. should attain the age of 21 years, and no longer; but in case his said son B. should die in his minority, then testator gave the said leasehold premises unto C. and D.

courts of law and equity, by the current of authorities in similar cases, it must prevail. But if, on the other hand, the presumed intention be obscure and ambiguous, not necessarily implied in the words, and wholly inconsistent with the legal operation; and if, on the other hand, the legal operation produces a clear uniform sense, without contradiction or absurdity; that construction ought to be preferred which explains the intention of the testator with the least violence to his words. That, though this case arose upon the devise of a trust, yet the Court of Chancery, in sending it to a court of law, judged that it ought to be governed by the same rules of construction as the devise of a legal estate; and it was submitted, that the will afforded no stronger coercive legal evidences of intent, such as must induce a court of law, from the necessity of his meaning, to over-rule the legal operation of his words, and vest an estate of inheritance in tail male in L. H. Hicks, in prejudice to his heir at law. It would serve to explain the grounds on which the appellant proceeded, if it was considered, 1st, What estate was devised to L. Hicks; the father? 2d, What estate was devised to his son? As to the first question, the testator had not left the possibility of a doubt, if his express declaration deserved any weight. He devised all his estate to L. Hicks, the father, for life, and no longer; enforcing his devise by negative words; which had hitherto been allowed, in all the cases adjudged, to be sufficient to prevent any implication by way of enlarging the estate, and extending the duration of it; so that the decree of the Court of Chancery, grounded upon the certificate of the Court of King's Bench, controlled, not only the legal force of the words, but their meaning in common use; and, in effect, expunged them out of the will; that, as all the authorities concurred against enlarging an estate for life into an estate of inheritance, where negative words were added to strengthen the express devise, so, likewise, they were uniform in not raising an estate tail, by implication in the tenant for life, either by way of present estate in possession, or by way of remainder in tail, after other limitations, unless the testator had limited express estates of inheritance to some of the sons or issue of the ancestor, tenant for life, nominatim, or by description; and then devised over the lands to another family, in default of issue, generally, of that ancestor. But this was a case, in which it had been held that, the tenant for life took an estate tail by implication, in virtue of the connecting words, "for want of such issue," where the default of issue on which the implication was raised, was not general, but relative by force of the word "such" to a particular antecedent limitation; and where that antecedent limitation was made only to one son of the tenant for life, without any collective description of his heirs male, or heirs of his body, and without any words devising an inheritance to that son. As to the second question, what estate was devised to the son of L. Hicks,—if the father took only an estate for life, there was no colour to say that any one could entitle himself as devisee of an estate of inheritance, by words of purchase in the will. The devise was made after the death of L. Hicks, to such son as he should have; no express words of limitation were annexed to it, to give an inheritance; no words on which it could be implied; the only doubt arising on some words which referred clearly to a failure of issue (whether a general or limited failure was the question), not of the son, but of the father; hence, it followed that the son intended by the will could only take an estate for life. In support of the decree, it was contended, that the words "son," "children," "issue," and "heir," in a will, where no son was in being at the time of the devise, were nomina collectivae, and sufficient to create an estate of inheritance, and carry the land, not only to the immediate heir, or issue, but to all that descended from the devisee; that the testator, in this case, could not have any particular person in view to take, but the issue male of L. Hicks, in a collective sense, was clear; because, at the time of making his will, L. Hicks was a bachelor; and therefore, to suppose he could mean to give a life estate only to some one son of L. Hicks, not then in being, would be a construction equally illiberal and absurd; that this was made still plainer, by the words which followed, namely, "for default of such issue;" for these words explained what kind of an estate, as to its continuance or duration the devisee should take, and were so frequently used to denote an estate tail, that they were become almost technical; so that express words were hardly better to be understood than the implication arising from this phrase: that in case of wills, the testator was inopis consilii, and had not always opportunities of observing the formalities of law; and it was a general rule, that the intention of the testator was to govern in the construction of wills; and that the judges would go as far as they could to assist and give effect to such intention; and therefore, as the word "son" would, in a will, signify an estate tail, as well as the words "issue," or "children," it was insisted that the devise in the will must, by consequence and operation of law to manifest the intent of the testator, be construed to create an estate tail. The judges were directed to give their opinions upon the following question:—Whether any, and what, estate or interest vested in Edmund Hicks? To which the Lord Ch. B. delivered their unanimous opinion, that an estate tail was vested in Edmund Hicks, as heir male of the body of Launcelot Hicks: whereupon the decree was affirmed.

[285]

sons of the said A., on either of them attaining the age of 21 years, as aforesaid; and he devised that his premises at R. might be quitted, and delivered up by his said son A. accordingly; and the testator, in a certain event, revoked, but otherwise confirmed, the said bequest to A., and the other legacies given to his family. B. attained 21. The question was, whether he was entitled? The Court held that he was: Lord Ellenborough relying much upon the direction, that the premises should be *quitted and delivered up, as aforesaid*, by testator's son A., that is, when A.'s son B. came of age, to B.; "for to whom else (said his Lordship) could A. deliver up the possession in that event?" See 3 Burr. 1634; 5 id. 2608; 2 Bl. Rep. 612; Moore, 635; Cro. Jac. 74; 2 Bulst. 113; Willes, 369; Owen, 29.

4. TENNY, D. AGAR, V. AGAR. E. T. 1810. K. B. 12 East, 253.

The cases
of Agar v.
Agar.*

A testator devised certain lands to his only son A. and his heirs, upon condition that he paid to testator's daughter B. 12l. a year until 21; and after that age to pay her 300l. for her portion; and in default of payment, that she should enter and hold them to her and her heirs for ever; and, *in case his said son and daughter happened to die, "without having any children issue, lawfully begotten, or to be begotten,"* then he devised the same to C. in fee. The son survived the testator; entered and performed the condition: he afterwards suffered a recovery, declaring the uses to himself in fee. The son and daughter both died without issue, the former having devised the property. The heir at law of C. brought this action (of ejectment) against the devisees, contending that the son and daughter took, respectively, an estate in fee, subject to an executory devise on their dying, "without leaving any child or issue" at their decease, (which of course, would not have been affected by the recovery) and not estates tail. But the Court held, that nothing could be clearer than that the deviser intended that C., the devisee in remainder, should not take until the extinction of the lives of issue of both his son and daughter; and that, to effectuate this intention, the true construction was that A. should take an estate tail only, with remainder in tail by implication to B. with remainder in fee to C.

See Vaugh. 279; 1 Eq. Ca. Abr. 197; Cro. Eliz. 919; 6 Re. 16. b; Willes, n. 74; 13 H. 7. 17. Pl. 22; Willes, 373; 2 Ves. 48 51; 1 P. Wms. 663; Com. Rep. 372; 3 T. R. 143; 6 id. 314; 7 id. 589; 7 East, 271; 1 East, 259; 1 Bro. Ch. Ca. 190; 9 East, 386.

5. ROMILLY V. JAMES. T. T. 1815. C. P. 6 Taunt. 263; S. C. 1 Marsh. 592.

[286]
And Romilly
v. James
must be,
however,
noticed;
and the ob-
servations
contained
in the note
to p. 285,
ante.

A. devised to his brother B. all his real and personal estate, subject to subsequent devises and legacies; then as to part of his lands, to B.'s son C. and his heirs for ever; and if B. and C. should die leaving no issue of either of their bodies, then all his real estate to D. A. died; B. and C. levied a fine of the premises bequeathed to C. to the use of themselves, their heirs and assigns for ever. C. suffered a recovery of the same premises to his own use. B. died in 1760, having had no other issue but C. C. died in 1779, never having had any issue. D. died in 1785; neither he, nor any one claiming under him, hav-

* It is observable, that in the case of Tenny v. Agar, the only material question was, whether the words "leaving any child or issue," meant an indefinite failure of issue; for, the affirmative of that proposition being established, it was necessary to inquire whether the estate of the first taker was cut down to an estate tail, with remainder in tail by implication to the other person, on the failure of whose issue it was given over, or whether the first taker had a fee, subject to an executory devise on these events; for, as in the former case, the recovery of the first devisee in tail acquired the fee, and, in the latter, the devise over was void for remoteness, the title derived from the first taker, *quacunque via*, was good. The opinion of the Court, therefore, upon the question of the estate tail created by implication, may be considered as extra-judicial. In this case, too, the words in question may have been intended to cut down the fee which the daughter was to take, on non-performance of the condition by the son, to an estate tail. In Romilly v. James, abridged *post*, p. 286. the learned Chief Justice appears to have considered the general devise to A. as a gift of the fee of the property in question in remainder. after an estate tail in B. and that it was in effect a devise to B. and his heirs; and in default of his issue, to A. and his heirs; and in default of issue of him, to J. Without inquiring into the soundness of this interpretation, it is clear that this case, too, does not warrant the proposition, that a devise, in default of issue of a person not heir at law, and not taking a prior estate by the will, raises in that person an estate tail by implication: 2 Powell, by Jarman, p. 206.

ing ever had possession of the premises. It was contended that C. took a fee, subject to an executory devise over, if himself and his father both died without leaving issue at their death. But the Court held, that he took an estate tail.

See 4 Co. 10; 3 T. R. 143; 7 id. 326, 589; 7 Taunt. 174; Hard. 400; 12 East, 253; F. N. B. 203.

(d) *As to transposing the limitations of two devises.**

(e) *As to construing a limitation with reference to others ejusdem generis.†*

(f) *As to connecting a will with another instrument, so as to give the first taker an estate tail.*

1. Doe, D. FONNERAU, V. FONNEREAU. K. B. Doug 487.

C. F. by indenture made between him and his eldest son, Thomas, in consideration of natural love and affection, granted an estate to Thomas for life; afterwards the father, by his will, devised the reversion to the heirs male of the body of Thomas. Lord Mansfield said, the Court was unanimous in thinking that the estate for life being by one instrument, and the limitation in tail by another, they could not unite.

(g) *As to constructing a codicil as distinct from a devise, so as to give an estate tail.*

SEALE V. BARTER. T. T. 1801. C. P. 2 B. & P. 485.

A. devised all his estates in the county of D. to a trustee for 200 years, to the use of the trustee during the life of his son, J. S., to preserve contingent remainders; nevertheless to permit J. S. to receive the rents and profits; and after his decease to the use of the first son of the said J. S. to be begotten on the body of the woman as he should happen to marry, and the heirs male of such first son; and for want of such issue, to the use of the second, third, fourth, and every other son of J. S. and the heirs male of their bodies in succession; and for want of such issue, then to the use of his daughter E. S., her heirs vice and assigns for ever, with a residuary clause in favour of J. S. The testator afterwards made a codicil, whereby he devised all his estates to his son J. S., and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should prefer; and for default of such issue then to his daughter E. S. and her children lawfully to be begotten, with a similar power; and in default of such issue, to J. S. and E. S. equally between them: and he further provided, that a settlement of 200*l.* per annum should be made on any woman whom his son should happen to marry, and that his estates should be chargeable therewith. At the time of making the codicil J. S. married, but had no child. The Court held that the codicil was to be construed independent of the will, and that under the codicil J. S. took an estate tail, with a power to settle the estates on all or any of his issue, in such way as he should appoint; and thereby determine the estate tail, so far as it should be inconsistent with such settlement.

(h) *As to what expressions raise cross remainders among devisees in tail.*

1. HOLMES V. MEYNELL. M. T. 1681. K. B. Raym. 452; S. C. Skin. 17; S. C. 2 Jones, 172; S. C. 2 Show. 135. S. P. Doe, D. GREGORY, V. WHITECHELO. 8 T. R. 211.

A testator devised in these words;—I give all my lands in M. to my daughters, Elizabeth and Anne, and their heirs equally to be divided between them; and in case they happen to die without issue, then I give and devise all the

* Where the intention of the deviser appears to be, that one should take by purchase, and the other by descent from him, the order cannot be reversed; so that if the former die in the deviser's life time, the latter cannot take as a purchaser; 6 T. R. 518.

† Where the question was, whether the words "heirs male," were used as words of limitation or purchase, and the limitation, upon which the question arose, was connected with the other subsequent limitations, in which the testator had used the same words as words of limitation, the Court inferred that they were employed in a similar sense; 8 B. & P. 620.

‡ But a devise to the heirs male of J. S. in a will, and afterwards in a schedule annexed, this estate being recited to be given to J. S., show an intention to give him an estate for life, which the law will conjoin to the estate given to his heirs male, and construe him to be tenant in tail: Hayes, d. Foorde, v. Foorde, 2 Blk. 698. abridged ante, p. 253.

An estate to A. for life by a deed, and a limitation of the same estate to the heirs of the body of A. [287]

by a will, do not unite so as to give A. an estate tail.† In this case a codicil was construed as a substantive devise.

Whenever land is given to several persons in tail, as tenants in common, and it appears to be the intention, that it is not to go over, until the failure of all the tenants in common, they will take cross-

remainders in tail a among them selves. said lands to my nephew. The Court adjudged that the two daughters took estates tail, with cross-remainders.

2. COOPER v. JONES. H. T. 1820. K. B. 3 B. & A. 425.

There must however, be some circumstance manifesting the testator's intention, in order to induce the Court to raise cross-remainders by implication; A testator, having three sons, devised as follows:—"I leave the Withystakes Farm with the appurtenants, to my two youngest sons, John and George, equally between them. share and share alike. And I entail the said farm on the male heirs of John and George being born in wedlock. There being no devise over, the Court held that cross-remainders could not be raised by implication; and that on the death of George without issue, his moiety went to the heir at law; and they said that if they were to decide that such implication could be raised in this case; the next thing that would be contended, would be that if there was a devise to two persons, of an entire estate in tail as tenants in common, cross-remainders ought to be implied between them. See 1 Atk. 579; Str. 969. 996; Cowp. 31; 1 Taunt. 224; 17 Ves. 78; Cowp. 777; 2 East, 36.

3. COMBER v. HILL. E. T. 1735. K. B. 2 Stra. 969. S. P. WILLIAMS v. BROWN. *ibid.* 996.

[288] And such circumstance must raise a necessary implication. R. H. devised lands to his grandson K. B. and grand-daughter A. B., equally to be divided, and to the heirs of their respective bodies; and for default of such issue to another person. It was determined that there were no cross-remainders between K. B. and A. B., because there were no express words, nor any necessary implication to raise them; for the mere words "and for default of such issue," being relative to what went before, only meant, "and for default of heirs of their respective bodies;" and then it was no more than if it had been a devise of a moiety to K. B. and the heirs of his body; and of the other moiety to A. B. and the heirs of her body; and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt.

4. WHITE v. PERY. E. T. 1778. K. B. Cowp. 777. S. P. COLE v. LEVINGSTONE. M. T. 1672. K. B. 1 Vent. 224.

It has been laid down, that cross-remainders cannot be implied between more than two. A person devised to his four sisters and a niece, for their lives, share and share alike, as tenants in common, and not as joint-tenants; remainder to their sons, successively, in tail male; remainder to their daughters in tail; reversion to his own right heirs. Lord Mansfield said: that wherever cross-remainders were to be raised by implication between two, and no more, the presumption was in favour of cross-remainders; where they were to be raised between more than two, there the presumption was against cross-remainders. But that presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross-remainders between more than two; but the true rule was to take it with the qualification above-stated. Here the presumption was against cross-remainders; and judgment was given, that there were no cross-remainders.

5. WRIGHT v. HOLFORD. E. T. 1774. K. B. Cowp. 31. S. P. DOE v. BURVILLE. E. T. 1773. K. B. cited 2 East, 47. S. P. PHIPARD v. MANSFIELD. E. T. 1778. K. B. Cowp. 797. S. P. DOE, d. GORGES, v. WEBB. E. T. 1808. C. P. 1 Taunt. 234. S. P. DOE v. COOPER. H. T. 1801. K. B. 1 East, 236.

But this doctrine is not now law.* A devise was made in these words:—"To the use of all and every the daughters and daughters of the body of P. H., and to the heirs of her and their body

* The alleged ground for the distinction between the favoured number of two, and a larger number of devisees, on account of the uncertainty and inconvenience, seems, says Mr. Jarman, (2 Powell, 606.) to be altogether futile; (Doe, d. Georges v. Webb, 1 Taunt. 234.) for it is obvious that the uncertainty and confusion would not be greater in implied than express remainders; and its origin can hardly be otherwise accounted for, than by attributing it to the general indisposition of our courts in early times to adopt modes of construction, which they considered (though in this instance erroneously) to have the least tendency to create questions of a complex or subtle character. The doctrine, indeed, for rejecting the implication between more than two devisees, did not long (if in effect it ever did) exist, but for a considerable period after it was virtually exploded, it was permitted to

and bodies lawfully issuing; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and, for default of such issue, to the right heirs of the devisor. There were two daughters; and one of them having died an infant, the question was whether her sister became entitled to her moiety. On a case being sent out of the Court of Chancery, for the opinion of the judges of the Court of King's Bench, the certificate was: There are no words in the instrument which intimate any intention to limit over the respective shares of the two daughters dying without heirs of their bodies respectively; on the contrary, the limitation over is of the whole estate to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over, on default of such issue, is to the heir at law. Consequently, we are of opinion that as nothing is given to the heir at law, whilst any of the daughters or their issue, continue, they must, amongst themselves, take cross-remainders.

6. *DOE, D. BURDEN, v. BURVILLE.* E. T. 1772. K. B. 2 East, 47. n.

A testator, after giving to his three sons estates in tail general, with cross-remainders, in default of their issue, limited the estate to all and every the testator's daughter and daughters, as tenants in common, if two or more, and not as joint-tenants, and to the heirs of her or their bodies issuing; remainder to the heirs of his brother.

The Court relied on the use of the word *remainder*, being in the singular number, and on the necessity of all the daughters of each of the testator's sons dying without issue, before the remainder to the other sons would take place, as circumstances, to show, that cross-remainders were intended between his own daughters. See 1 Vent. 224; 1 Ves. 202.

7. *ATHERTON v. PYE.* T. T. 1792. K. B. 4 T. R. 710.

The testator devised to all and every the daughter and daughters of the body of his daughter M., and the heirs male of the body of such daughter, or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for, and in default of such issue, he gave and devised all his said premises unto his right heirs, for ever.

Per Cur. As between two only, it should be presumed that cross-remainders were intended to be raised; but, if there were more than two, it was necessary to resort to other words in the will, to discover an intention to raise cross-remainders; but here there was no doubt, from the words of limitation over, but that the devisor intended to raise cross-remainders between the grand-daughters. The testator clearly intended that the whole should go together; whereas, if cross-remainders were raised between the grand-daughters, it would go to the right heirs, by separate portions, on the death of each grand-daughter.

8. *WATSON v. FOXON.* H. T. 1801. K. B. 2 East, 36.

From the terms of a will, it appeared that, after the creation of estates for life to A. and B., there was a limitation of all and every the said premises to all and every the younger children of B., begotten, or to be begotten; if more than one, equally to be divided amongst them, and to the heirs of their respective body and bodies, as tenants in common, &c., and, if only one child, then to such only child, and to the heirs of his or her body issuing; and, for want of such issue, the testator went on to devise "the said premises to E. F., &c." (with several limitations over); "and, for want of such issue," the testator divided the said premises between several branches of his family. The question raised was, whether cross-remainders were to be implied between the younger children of B. The counsel relied chiefly on the word *respective* in the limitation to the younger children of B. and the heirs of his and their respective body and bodies, &c. as disjoining the title, and preventing the raising of cross-remainders to preserve a semblance of authority; for the judges, not venturing altogether to discard the distinction in regard to the number of devisees, said: that the presumption was in favor of cross-remainders between two; but between more than two they were rather to be presumed against, though such presumption against them might be repelled by a plain indication of intention.

[289]

For, though in devises between more than two, the presumption is against cross-remainders yet that may be controlled by a plain intention to the contrary.

Thus, under a devise to the daughters of B., and their issue; and in default of such issue, then over; B.'s daughters were held to take cross-remainders.

[290]

So, where a person devised an estate to all and every the younger children of B.; if more than one, in equal shares, and to their respective heirs, to hold as tenants in common; and if one only

then to that one and his heirs; and, for want of such issue, he gave the said premises to E. F. held that cross-remainders were to be implied between the younger children of B.

remainders between such children. The cases of *Comber v. Hill*, 2 Stra. 969. and *Davenport v. Oldis*, 1 Atk. 579. were relied on. The Court said: where cross-remainders are to be raised by implication between two, and no more, the presumption is in favour of cross-remainders. Where they are to be raised between more than two, the presumption is against them; but that presumption may be answered by circumstances of plain and manifest intention either way. The question in this case is, was the remainder man intended by the testator to take in any event, whether there were one or more children; it is plain that he was to take the whole; for the devise to him is of the said premises, which must mean the whole, in default of such issue, that is, in default, whether of one or more. And this is rendered still more plain, by the subsequent part of the will, where, after other intermediate limitations, the estate is to be divided into several portions, which shows that the testator meant that it should go over entire, till the event in which it was expressly directed to be divided. We have no doubt, therefore, but that the testator intended to give cross-remainders amongst the issue of B. But the word *respective* has been relied on, as showing an intention to sever the title, and against cross-remainders. But, if that word had been omitted, the result would have been the same. The children would equally have taken as tenants in common. Unless, therefore, the use of that word shows a different intent in the testator, we cannot distinguish this case from any other, where it was omitted in a devise of the same kind. See *Cowp.* 780: 3 T. R. 528; 2 Barnard, 231; 2 Stra. 996; 1 Saund. 185; and 1 East, 229. 416.

[291] 9. *ROE, D. WREN V. CLAYTON.* 1805 K. B. 6 East, 628. Judgment affirmed, 1 Dow. 384.

So, in this case, cross-remainders were implied among several branches of issue, upon expressions referring to a preceding devise to daughters in tail, among whom cross-remainders were held to be implied.

A. B. devised all his lands to his niece, C. D., for life; and, after that estate determined, the same to trustees, to preserve contingent remainders; and, after her decease, then to remain to her first and other sons, successively, in tail; remainder to her daughters, as tenants in common, in tail; and, for default of such issue, then to the issue of A. B.'s four sisters, in such manner as he had limited the same to his niece's issue; and, for default of such issue of his sister, to his own right heirs. One of the questions in this case was, whether, supposing the several stocks of issue of his sisters took the estate in equal fourths *per stirpes* (and not the whole *per capita*, as was also contended), there were cross-remainders between such stocks. This raised the question, whether cross-remainders would have been created between the daughters of the niece? though it was contended that, even admitting the implication in regard to them, it did not follow that the words "in like manner" &c. should be construed to do more than raise cross-remainders between the issue of each sister *inter se*. The court thought the implication of cross-remainders among the daughters of the niece was perfectly clear, inasmuch as it was the plain intent of the testator that no part of his estate should go over to the issue of his sisters, till default of issue of his niece; and they were further of opinion, that cross-remainders were to be implied among the several classes of the issue of the sisters.

3. Estate for life.

(a) Where there are no words of limitation.

1. *DENN V. GASKIN.* M. T. 1777. K. B. *Cowp.* 657. S. P. *ROE, D. KIRBY V. HOLMES.* M. T. 1757. C. P. 2 Wils. 80. S. P. *RIGHT V. RUSSELL.* cited *Doug.* 761. S. P. *ROE V. BLACKETT.* H. T. 1775. K. B. *Cowp.* 235. S. P. *ROE, D. CALLOW V. BOLTON.* M. T. 1777. 2 Bl. Rep. 1045. S. P. *RIGHT V. SIDEBOTHAM.* T. T. 1781. K. B. *Doug.* 759. S. P. *DENN V. PAGE.* cited 1 B. & P. 261. S. P. *HAY V. COVENTRY.* H. T. 1789. K. B. 3 T. R. 83. S. P. *FOSTER V. ROMNEY.* M. T. 1819. K. B. 11 East, 594. S. P. *DOE V. MULGRAVE.* T. T. 1793. K. B. 5 T. R. 320. S. P. *FROGMORTON, D. WRIGHT V. WRIGHT.* 2 Bl. 889; S. C. 3 Wils. 464. S. P. *ROE D. TOOLEY V. GUNNIS.* 4 Taunt. 313. S. P. *ROGERS, D. DAWSON V. BRIGGS.* And. 210. S. P. *MEDLYCOTT V. JORTON.* 2 B. & B. 632; S.

C. 6 Moore, 1. S. P. ROBINSON v. WATKINS. Skin. 385. S. P. MIDDLETON v. SWAIL. Comb. 201.

John Gaskin began his will thus: "As to all such worldly estate as God has endowed me with;" he then gave all that his freehold messuage and tenements lying in G. to his three nephews, equally to them, and gave ten shillings to his heir at law. Lord Mansfield said it was settled in devises as well as in deeds, that, if no words of limitation were added, the devisee could only take an estate for life, because the law implied an estate for life only, where there were no words of limitation; but, as there were no technical words necessary in a will, if the testator made use of what was tantamount, as if he said, I give to such a one in fee-simple, or all my estate, that would carry all his interest in the land devised. But there must be words in the will to control the rule of law, which, he believed, in a variety of cases, thwarted the intention of the testator. He suspected extremely, that in this very case the testator meant to give his nephew a fee in the premises in question; for he had no landed property. He made them residuary legatees of his personalty, and gave a disinheriting legacy to his heir at law, agreeable to the vulgar notion, taken from the Roman law, that an heir is cut off with a shilling. But the simple question was, whether the court could find any words in the will to take this case out of the rule of law; if they could not, it must be adhered to. He said, it was impossible to find words in this will sufficient to control the rule of law. There were no words that could connect the devise of the lands in question with the introduction, so as to pass the whole interest; therefore the devisees could only take an estate for life.

2. DOE v. ALLEN. H. T. 1830. K. B. 8 T. R. 497.

A person made his will in these words: "As to what real and personal estate it hath pleased Almighty God to bless me, I give and dispose of the same as followeth: First, my will is, that all my debts and funeral expenses be justly paid and discharged out of my personal estate; and, if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being, &c. unto W. A." And the question was, what estate passed by these words? Lord Kenyon said, that the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient; and, therefore, did not come up to the cases cited of a gross sum to be paid out of the land devised; and, consequently, the words gave no more than an estate for life to the devisee.

(b) *Where words of limitation are added.*

DOE v. LAMING. M. T. 1760. K. B. 2 Burr. 1100; S. C. 1 Bl. Rep. 265. S. P. LOWE v. DAVES. M. T. 1729. K. B. 2 Id. Raym. 1561. S. P. DOE v. BENDALE v. SUMMERSETT. E. T. 1770. K. B. 5 Burr. 2608; 2 Bl. Rep. 692.

Lands held in gavelkind were devised to A. C., and the heirs of her body, lawfully begotten, or to be begotten, as well females as males, and to their heirs and assigns for ever, to be equally divided, share and share alike, as tenants in common, and not as joint tenants. Lord Mansfield said, it was manifest the testator did not mean that his estate should go in a course of descent in Gavelkind; for he gave it to the heirs of the body of A. C., as well females as males, therefore they could not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation, for the testator breaks the gavelkind descent, by giving it to females as well as males.

(c) *Where an express estate for life is given.*

1. BAMFIELD v. POPHAM. H. T. 1702. K. B. 1 P. Wms. 54. S. P. BLACKBORN v. EGGLEY. id. 600. S. P. FELL v. FELL. 2 Bl. 888; S. C. 3 Wils. 399. S. P. GOODTITLE D. WINCKLES, v. BELLINGTON. 2 Doug. 753.

A person devised his estate to trustees and their heirs, in trust for P. for life; remainder to his first and other sons successively in tail male: and for

*Or an annuity, during the life of the devisee; Dyer, 371.

Where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee will take only an estate for life.

Though the same charged with a payment.*

On the other hand, although such words as "heirs of the body," may be added, but the general intent of the testator can only be affected by construing them as words of purchase, the devisee will only take an estate for life. Of course, where an

expressed want of issue male of P. to another person. Afterwards the testator, by a codicil, reciting that he had by his will given the premises to P. and the heirs male of his body, willed, that if the estate should determine, and P. should die without issue male, then his estate to be disposed of in a particular manner. The questions were, 1st, whether the words of the will, viz. for want of issue male of Popham, did not by implication give an estate tail to P.? 2ndly, whether, admitting the words in the will did not give an estate tail, the codicil, reciting that the testator had by his will devised the premises to P. and the heirs male of his body, would not so far influence and explain the will as to make it an estate tail, though it was not so before. It was resolved unanimously, that P. had only an estate for life by the will; and that the same was not enlarged or altered by the codicil; for there being an express estate given to P. for life, with remainder to his first and every other son, &c; the words, "if P. should die without issue male," should not enlarge his estate to an estate tail, in regard these amounted only to make an estate tail by implication; and words of implication could never destroy what was before expressed; so that the words "if he should die without issue male," could mean no more than if he should die without sons.

2. TOMLINSON v. DIGHTON. T. T. 1711. K. B. 1 P. Wms. 149.

J. T. devised lands to his wife for her life, and then to be at her disposal, provided that it was to any of his children, if living; if not, to any of his kindred that his wife should please. It was resolved by the Court of K. B. upon a writ of error from the C. B. that the wife had but an estate for life, with a power of disposing of the inheritance. And Lord C. J. Parker said, that the difference was where a power was given with a particular description and limitation of the estate, as here, and where generally, as to executors, to give or sell; for in the former case, the estate limited being express and certain, the power was a distinct gift, and came in by way of addition; but in the latter, the whole was general and indefinite; and as the persons intrusted were to convey a fee, they must, consequently, and by a necessary construction, be supposed to have a fee themselves.

[294]

In determining whether an estate be vested or contingent, the first question is, whether it be limited to persons *in esse*, and ascertained, and stand unconnected with any uncertain event, in which case, the estate vests *instantly*. An estate will, however, be construed to be contingent, if clearly so expressed, *however absurd and inconsistent*;

4. Terms for years. *

5. Estates executory, contingent or vested.

(a) As to estates vested or contingent.

(a 1) General rule.

1. DENN, D. RADCLIFFE, v. BAGSHAW. H. T. 1796. K. B. 6 T. R. 512. S. P. NORTON v. LADD. T. T. 1684. C. P. 1 Lutw. 291. S. P. BARE v. AMHERST. T. Raym. 83. S. P. WRIGHT v. HAMMOND. E. T. 1722. K. B. 11 Mod. 345; S. C. 1 Stra 427. S. P. DOE, D. BROWN, v. HOLME. 2 Bl. Rep. 777; S. C. 3 Wils 241. S. P. GOODRIGHT, D. DOCKING, v. DUNHAM. 1 Doug. 264. S. P. CHAPMAN, D. OLIVER, v. BROWN. 3 Burr. 1626. S. P. MORGAN, D. SURNAM, v. SURNAM. 1 Taunt. 289. S. P. NICHOLL v. NICHOLL. 2 Bl. Rep. 1159. S. P. PHILLIPS v. DDAKIN. T. T. 1813. K. B. 1 M. & S. 744. S. P. ANON. H. T. 1674. C. P. 2 Mod. 7. S. P. PARSONS v. PEACOCK. 8 Mod. 346. S. P. LUDDINGTON v. KIME. 1 Ld. Raym. 207. S. P. BEACHCROFT v. BROOME. 4 T. R. 441. S. P. BROWN v. CUTLER. T. Raym. 426; S. C. 2 Show. 153. S. P. GOODTITLE, D. HAYWARD, v. WHITBY. Keny. 506.

The devise was to testator's only daughter M. for life, and after her decease to the first son of her body, if living at the time of her death, and the heirs male of such first son; remainder to the other sons successively in tail, in like manner; remainder to testator's nephew in tail. M. had issue an only son, who died in her life-time, leaving issue. Whether such issue was entitled under the devise in tail to his father, was the question. But the Court reluctantly, on account of the hardship of the case, decided that the son not having survived his mother, his estate never arose.

* An estate may be devised to a person for a term of years, as well as for any freehold interest; 6 Crn. Dig. 299. Whenever a term of years is devised, the assent of the executor is necessary, to complete the title of the devisee: 10 Rep. 47. b.

2. *DOE, D. VESSEY, v. WILKINSON.* H. T. 1788. K. B. 2 T. R. 209.

Lands had been settled on A. for life; remainder to trustees to raise, in case J. W., or any of his issue, should be living at her death, 1,000*l.* for such person as A. should appoint; remainder to J. W. for his life; remainder to his children in tail; remainder to A. in fee. A. by will, reciting the settlement, gave the 1,000*l.* in case J. W. or any of his issue, should be living at the time of her death, to A. W.; she then proceeded to declare that, "in case neither the said J. W., nor any issue of his" should be living at the time of her decease, by which event the premises would devolve upon her and her heirs, then she gave the same to trustees for 500 years to raise certain sums of money within six months after her decease; and from and after the expiration or other sooner determination of the said term, and subject thereto, the testatrix gave the premises to her brother for life, with remainder to her (testatrix's) daughter, M. W. in fee; but if she died before twenty-one, and without issue, to her son-in-law, A. W. in fee, he paying certain legacies. J. W. survived the testatrix, and afterwards died without issue; and the question was whether in that event the devise took effect. The Court agreed that the limitation of the term was void in that event and a majority of the judges (Grose, J., Ashurst, J., Buller, J., *dissentiente*) held, that the devise of the inheritance was dependant upon the same contingency.

And even where testator has mistaken the extent of his power of disposition.

[295]

3. *BRADFORD v. FOLEY.* H. T. 1779, K. B. 1 Doug. 63.

In a case referred by the Court of Chancery to the Court of K. B. the facts were: J. H. devised all his real estates to trustees, to the use of his son T. for life; remainder to the first and other sons of T. by any future wife in tail male; remainder to the daughter and daughters of such future wife and their heirs, as tenants in common; provided, that if his son should marry any woman related to his then wife, all and every the above uses, so far as the same related to the issue of such future marriage, should cease and be void; and the said trustees should stand seised of all the premises to the use of the children of his brother, T. H. and their heirs, as tenants in common. Soon after the death of the testator, T. H. the son, died without issue, and without having married again, leaving T. F. H. his heir at law. The question for the opinion of the Court was, whether the children of T. H. the brother of the testator, had taken any and what estate in the case that had happened. The Court certified their opinion that the children of T. H. the testator's brother, took estates tail under this devise. The Court must therefore have thought that the contingency of the sons marrying again, &c. was confined to the estates limited to the future issue.

But where constraining the devise to be contingent would defeat a declared object of the testator, such a construction will, if possible, be avoided.

4. *DAVIS v. NORTON.* M. T. 1726. 2 P. Wms. 390. *S. P. EVERED v. HONE.* H. T. 1677. C. P. 2 Mod. 293.

T. H. devised lands to his son W. and the heirs of his body; and if his said son should die without issue of his body, and the testator's wife A. should survive his son, then that she should enjoy the premises for her life; after her decease they should be enjoyed by the testator's sister, M. S., for her life; after her decease (the testator's son W. being dead without issue, as aforesaid) then the testator devised the premises to the lessor of the plaintiff. The testator's wife did not survive his son, but died before him. Upon a question whether the ulterior devise over had not failed by the wife's death in the son's life time; a case made by consent, for the determination of the judge (Reynolds) who tried it, whose opinion was, that the remainder limited by the will was contingent, depending on the death of the son, without issue in the life time of the testator's wife; and as that contingency never happened, the remainder which depended thereon could never arise. The judge appears to have laid much stress on the words: "The testator's son being then dead, without issue, as aforesaid," annexed to the remainder after the wife's decease, as equivalent to a repetition of the contingency first expressed of the son's dying without issue, the wife then living.

A question frequently arises, whether the contingency extends to a series of limitations, or is confined to the estate which the testator immediately associated with it.

[296]

5. *DOE, D. WATSON, v. SHIPPHARD.* H. T. 1779. K. B. 1 Doug. 75.

Lands were devised to trustees, upon trust, out of the rents, to pay 20*l.* annuities, to

Under a devise, there, of lands to trustees, to

pay 20l. of the rents and profits to the testator's daughter for life; to pay the residue of the rents, and the whole, after her decease, to her husband for his life. If she should happen to survive her husband, then to stand seised of all the lands upon the trusts after mentioned: viz. to his said daughter for life; and after her death to the use of her son H., and the heirs of his body; then to the heirs of the body of the husband by the daughter; then to the heirs of her body; remainder to her husband and his heirs for ever. The testator's daughter died in the life time of her husband. It was held that the limitations over should not take effect, for, that the contingency was not confined to her life estate, but extended to all the subsequent limitations; the Court not finding upon the whole will sufficient to gather a different intent, so as to warrant them in supplying the omitted words.

ter should survive her husband, then to her for life; then to her son, H., and the heirs of his body, then to the heirs of the body of the husband, by the daughter, then to the heirs of her body, then to the heirs of the husband; the daughter dying before the husband, the limitations over shall not take effect, the contingency not being confined to her life estate, but affecting the other limitations, and operating as a condition precedent.

6. HORTON V. WHITTAKER. T. T. 1786. K. B. 1 T. R. 346.

If, however, it appears that a testator after devising lands to his wife for life, and expressing his next desire to provide for his sisters; but, considering that his sister M. wife of W. was already well provided for, during the life of her said husband, and therefore would not, unless she happened to survive him, want any assistance to enable her to live in the world, devised lands to trustees and their heirs in trust, during the life of the said M. to pay the rents and profits to the testator's sisters, E. and B., their heirs and assigns; and after the decease of the said W., in case the testator's sister M. should be then living, then to the use of the three severally, in thirds, for their respective lives, with several remainders to their sons successively in tail; remainder to their daughters as tenants in common, with cross-remainders between the sisters in default of issue of their bodies respectively. The question was whether the condition of M.'s surviving W. was merely confined to the life estate, or was to extend to all subsequent limitations? The Court held, that the condition of the married sister surviving her husband did not extend to any of the limitations subsequent to her estate for life.

7. DOE, D. BALDWIN, V. RAWDING. E. T. 1819. 2 B. & A. 441.

It may be, however, here observed, that an estate once vested, will not be divested, unless by some subsequent event. A. B. devised to his daughter, then under age, an estate in fee; and, if she died under the age of 21 years, unmarried, and without leaving lawful issue, then to his wife in fee. The daughter, married and died under the age of 21 years, without issue, but left her husband surviving her. Under these circumstances, it was urged that the devise over took effect.

[297] *Sed per Cur.* According to the plain and obvious meaning of the words "under the age of 21 years, unmarried, and without lawful issue," the testator provides for a single event, consisting of three parts, namely dying under her minority, dying unmarried, and dying without children. The fee must therefore go to the heir at law. See 12 East, 289; Cro. Car. 154; 3 Atk. 390; 2 Ves. 247; 3 B. & P. 652.

8. DOE, D. EVERETT, V. COOKE. H. T. 1806. K. B. 7 East, 269; S. C. 3 Smith's Rep. 236.

Where, therefore, A. devised a term to C. for life, and, after his decease to his child or children, and their executors, &c. but up on condition that if C. should die an infant, unmarried and without issue, the premises to go over to his father, D, and his three other children, share and share alike, and their heirs, executors, &c. The question raised was, whether the limitation over to D. and his three children was void, C. having lived beyond the age of 21, and having married, and then died without issue.

Per Cur. On reading this will, although there may be perhaps a fair presumption that the contingency is always so confined, where the ulterior limitations do not follow the contingent estate, in one uninterrupted series, in the nature of remainders, but are limited in the form of substantive independent gifts; 3 Atk. 774; Amb. 204; 3 Madd. 255; 3 Moore, 358: sed vide 2 T. R. 209.

assumption that the testator's intention was that the property should go over to D. and his children, in case C. died without issue; yet the words are too strong not to render it imperative on us to say, that the devise over depended on one contingency, viz. C.'s dying an infant; attended with two qualifications, viz. his dying without leaving a wife surviving him, or dying childless; and that the devise over could only take effect in case C. died in his minority, leaving neither wife nor child. For if such had been really his intent, nothing would have been easier than to have expressed it clearly; as for instance he might have said, "my will is that, in case the said C. should die an infant, or should die unmarried, or without issue living at the time of his decease, then I give the same to D. and his three children." Now in order to support this construction we must reject the words *infant* and *unmarried* altogether; or if we suffer these words to remain, we must insert the word *or* between the other articles of the condition, and read it: "if he should die an infant, or unmarried, or without issue." But this would leave it upon any one single event, as his dying unmarried; for unless he were married, he could have no lawful issue. That mode of reading the will would defeat the will would defeat the limitation, if he died unmarried at any time; and that difficulty occurs whether it be construed in case he died an infant, unmarried, or be unmarried and of age at the time of his death. And if we convert the word *and* into *or*, and it is to apply to each part of the sentence, making all the branches of the condition in the disjunctive, then according to the rule in *disjunctivis sufficit alteram partem esse veram*, it would have gone over, in case he died an infant, to the prejudice of his children, if he had any.—Judgment must be given for the plaintiff. See 2 Str. 1175; Pollexf. 645; 3 Atk. 399; 1 Wils. 149; 1 Bro. C. C. 187; 1 P. Wms. 663; 3 T. R. 143; Cro. Car. 154; Sir W. Jon. 205; 2 Vern. 388. 670; 1 P. Wms. 142; 6 T. R. 30; 3 Atk. 309.

(b 1) *In default of objects of preceding limitations.*

[298]

1. *DOE, D. DACRE, v. DACRE.* E. T. 1798. C. P. 1 B. & P. 250. Judgment affirmed. K. B. 3 T. R. 112. S. P. LEWIS, D. ORMOND, v. WATERS. 6 East, 336. over-ruling *KEENE, D. PINNOCK, v. DICKSON.* M. T. 1783. K. B. MSS. 1 B. & P. 254. n. *DENN, D. BRIDAEN, v. PAGE.* M. T. 1783. K. B. MSS. 1 B. & P. 261. n.

From the facts submitted to the Court, it appeared that a testator had devised as follows: to his seven sisters, share and share alike; on the death of any of them, her share to go to her first and other sons in tail; and in default of such sons, to her daughters, as tenants in common. In case of any of the seven sisters dying without issue, or such issue dying under 21, the surviving sisters to take her share; and if all the sisters should die without issue, or such issue die under 21, then over. It was contended on one side that the remainder over to the daughters was only a contingent devise, in the event of their being no son; and that the birth of a son rendered such a remainder void.

Sed per Cur. Taking a general view of the whole will, the intent of the testator appears to us to be obvious. He meant to make provision for each of his seven sisters and their children; and he meant that if either of his sisters or her children, should fail within a given time, that their should be a survivorship in favour of the other sisters and their children; and he also intended that if neither of his sisters should have children, or if the children should all die under 21, and without issue, another branch of his family should take. In some event or other, he meant not only that the sons should take an estate tail but also that the daughters should take such an estate failing the sons. The next consideration is whether the words the testator has used will bear that construction which he probably intended to give them. The words used are: "in default of such sons." It is impossible to say without reference to the context what the meaning of these words is. The word "default" in its largest and most general sense seems to mean "failing;" and it has been accordingly argued that the birth of a son would satisfy the words, and show that there was no default, and defeat the remainder. But there is no reasonable ground for so confining the word default as to make the mere birth of a son destroy the

contingency, contrary to the plain sense of the testator, who clearly meant the default of such issue as would take the benefit of his devise; whereas a son dying in the life-time of his mother could take nothing. We think, therefore, that we are bound by every rule to say that the testator meant to use the words "in default of such issue" in the sense of "failing the limitation to the sons," and that the daughters did take.

A devise to a person, if he shall live to attain a particular age, would be contingent; but a different rule prevails, if there be a limitation over in alternate events.

2. *EDWARDS V. HAMMOND*. T. T. 1683. K. B. 3 Lev. 132; S. C. 2 Show. 398; S. C. 1 N. R. 324. n.

John Hammond surrendered the premises in question to the use of himself for life; after his decease, to the use of J. H. the younger, and his heirs and assigns for ever, if it should happen that the aforesaid J. H. the younger, should live until he attained the age of 21 years; provided always and under the condition nevertheless that if it should happen that the aforesaid J. H. the younger, should die before he attain the age of 21 years, then to remain to the use of the surrenderor and his heirs. Resolved that this was a condition subsequent; and that the estate vested immediately in J. H. subject to be divested if he died under the age of 21 years.

A devise in fee to A., when he attains 21; but, in case he dies before 21, then over; was holden to give an immediate vested interest.

3. *DOE, D. HUNT, V. MOORE*. E. T. 1811. K. B. 14 East, 601. S. P. *BROMFIELD V. CROWDER*. T. T. 1805. 1 N. R. 313.

A testatrix devised real estate in fee to J. M., when he attained the age of 21; but, in case he died before 21, then to his brother, when he attained 21; with like remainders over. The question was, whether the devise to J. M. was contingent on his attaining his majority, or vested immediately.

The Court held, that J. M. took an immediate vested interest, liable to be divested, upon his dying under 21. See 1 Eq. Ca. Abr. 195; 3 Lev. 132; 1 N. R. 313; 1 Burr. 228.

4. *DOE, D. ROAKE, V. NOWELL*. E. T. 1813. K. B. 1 M. & S. 327.

A testatrix devised all her freehold estates to her nephew and heir at law for his life; and on his decease, "to and amongst his children lawfully begotten, equally, at the age of 21, and their heirs, as tenants in common; but it only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of 21. And, in case my said nephew should die without lawful issue, or such lawful issue should die before 21, then over.

The Court held, that the children of the nephew took a vested remainder, referring to the cases of *Bromfield v. Crowder*, 1 N. R. 313; and *Doe v. Moon*, 14 East, 601. See also Co. Lit. 204; 3 Rep. 19; 10 id. 50; 3 Lev. 132; 2 Show. 398; 1 Burr. 228; Sir T. Raym. 82; S. C. 1 Sid. 153; Cro. Eliz. 122; 2 B. & P. 589; 6 T. R. 512.

but if only one child shall live to attain such age, then to such child and his or her heirs, at his or her age of 21; and in case J. S. should die without issue, or such issue should die before 21, then over; the children were holden to take a vested remainder.

5. *BROMFIELD V. CROWDER*. T. T. 1805. C. P. 1 N. R. 313.

The devise was to certain persons for life, and then to J. D. B., if he should live to attain the age of 21 years; and, in case he died before he attained that age, and his brother C. B. should survive him, then over. The Court of Common Pleas certified, that J. B. D. took a vested fee.

ly on the event, on which the prior devise is apparently made contingent, is also associated with some other event.*

[300]

(c 1) *Where a particular estate intervenes.*

Estates may be vested in interest, notwithstanding the creation of in

1. *DENNE, D. SATTERTHWAITE, V. SATTERTHWAITE*. M. T. 1765. C. P. 1 Bl. Rep. 519. S. P. *GOODTITLE, D. HAYWARD, V. WHITBY*. H. T. 1757. K. B. 1 Burr. 228. S. P. *GOODRIGHT, D. REVELL, V. PARKER*. T. T. 1813. K. B. 1 M. & S. 692.

Ejectment. The premises were a customary estate of inheritance, descendible from ancestor to heir, according to the custom of the manor; and, by the custom, all tenements were devisable by will, in writing, without surren-

* But the principle of the above cases, of course, does not apply, if there be an express declaration that the land shall vest at 21; 2 Meriv. 38.

A devise to a person, after payment of debts, is not contingent until the debts are paid, but vests immediately; 1 P. Wms. 505; 2 Eq. Ca. Abr. 224. pl. 5, 6; 3 Bro. P. C. 64.

der. C. S., being admitted tenant in fee, by will, 2d of November, 1738, devised the premises to W. S., for his maintenance and education, till he attained the age of 21 years; after which, he devised the same to A. B., and his heirs. W. S. entered and was admitted. A. B. the grandson, died before 21, unmarried, and the defendant is his brother and heir at law. C. the eldest son and heir of the deviser, died after A. B., grandson, leaving E. his next brother and heir at law, who (13th May, 1761) devised all his customary estates to his nephew, E. S., the lessor of the plaintiff in fee. Neither C., the son, nor E. his brother, were ever admitted tenants, or were in possession of the rents and profits; and there was no instance of devising customary estates in this manner before admittance. The questions were; 1st, As A. B. the grandson, died before 21, whether the premises descended to his heir at law? If not, 2d, As E. the son of C., was never admitted, whether the premises passed by his will? The Court was clear, that in the case at bar, W. S. the father, was only in the nature of a guardian to his son; and that the fee-simple vested instantly in A. B., the son; wherefore, the second point was not argued; and there was judgment for the defendant; that the plaintiff be non-suited.

intervening particular estates.*

A devise to trustees, until A. should attain the age of 24, on condition that they repair the premises; and when and so soon as he should attain that age, to him in fee,†

2. *DOE, D. WHEEDON, V. LEA. H. T. 1789. K. B. 3 T. R. 41.*

The testator devised copyhold lands to trustees and their heirs, until A. then an infant of about 13 years of age, should attain the age of 24 years, on condition, out of the rents, &c. to keep the buildings in repair; and he devised unto A. and his heirs and assigns, for ever, when, and so soon, as he should attain the age of 24 years, the same premises, and directed the trustees to surrender the same accordingly. A. died intestate, before he attained the age of 24, without issue. The question was, whether the fee had vested in A. immediately after the deviser's death? *Per Cur.* It has been contended, that A.'s attaining the age of 24 years was a condition precedent; and that not having happened, the estate never vested in A. Certainly, if this were a condition precedent, the consequence contended for would have been the result. But the fee vested in A. immediately; and the words *when, and so soon, &c.* only denote the time when he was entitled to the possession.

301 | gives him a vested interest.

So, where an estate in remainder is limited in

3. *ANON. H. T. 1682. K. B. 2 Vent. 363.*

The devise was to K. in tail; remainder to J. for life; and in another clause, it was declared, "that if K. died without issue, and J. be then deceased, then, and not otherwise, the testator gave the land to J. N. and his heirs." It was decreed for J. N. although J. survived K.; because the words "if J. be then deceased" seemed to be put in to express the testator's meaning, that J. should be sure to have it for her life; and that J. N. should not have it till she was dead; and also to show when J. N. should have it in possession. are precisely those on which the preceding estates being determined, it will fall into possession, it is construed as a devise immediately vested, the possession of which is necessarily dependent on the events in question.

terms of contingency, on the happening of certain events, and the events described

4. *BADGER V. LLOYD. H. T. 1698. K. B. 1 Ld. Raym. 523; S. C. 1 Salk. 232; S. C. Com. 62*

A person conveyed his estate to the use of himself for 99 years, if he should so long live; remainder to his wife in the same manner; remainder to his son in the same manner; remainder to trustees and their heirs, during the lives of the father and son, to preserve contingent remainders; remainder to the first and other sons of the son in tail male; remainder to the father in fee. The father made his will; and, after reciting the settlement, devised the lands, after the death of his son, without issue male, to another son. It was objected that the devise was executory; and, as it could only take effect on the death of the son without issue, it was void, as being too remote. But to this it was

So, devises of reversion in terms of contingency corresponding exactly with the events on which they fall in to possession, have been held

* And his rule has, in many instances, been extended to cases, in which the terms used might seem to denote contingency. Thus, where lands are devised to A. and B., until C. attain 21; and when C. attains that age, to him and his heirs; C.'s estate is not a contingent interest, depending upon his living to his majority, as the words might seem to import, but vests instant, the words "when he attains that age," being considered as merely marking the period at which it takes effect in possession; 2 Powell, by Jarman, p. 215.

to be immediate devises of such reversions.

answered that, here, a man entitled to a reversion, expectant on an estate-tail, devised it, after the death of the tenant in tail without issue, to another; this was not executory, but an immediate devise; and the words "from and after" were only a declaration when it should take effect in possession. If the son had not an estate tail in the land, but the devises had been after the death of a stranger without issue, they would have been executory devises, and void, by reason of the remoteness of the possibility; but here they were limited after the determination of the particular estates.

(d 1) *Effect of the contingency not accruing on subsequent limitations.*

1. STAINHAM v. BELL. E. T. 1775. K. B. Lofft. 455. S. P. ROWSE's Case. H. T. 1773. *ibid.* 97. S. P. DOE, D. LEACH, v. MICKLEM. 6 East, 486. S. C. 2 Smith's Rep. 499. S. P. DOE, D. PLANNER, v. SCUDAMORE. 2 B. & P. 289. S. P. ANON. Lofft. 452.

A devise over shall take effect, [302] where a contingency, supposed precedent, has never happened.

The case was thus: Devise to a son, of which he supposed his wife *ensiente*, of his whole estate, with certain limitations if it should be a daughter. And, on failure of issue of such son in tail, or daughter dying under age, remainder to his wife, the wife shall take, though no after-born son or daughter ever came into being. *Per Cur.* We think it was the plain intention of the testator, in case no son should be born, and he should have no daughters who should live to the age of 21 years, that the wife should have the whole estate. Therefore, we think, on the event that has happened, that she ought to have the whole estate.

2. DOO v. BRABANT. T. T. 1792. K. B. 4 T. R. 706. S. P. ROWSE's Case. Lofft. 97. S. P. STAINHAM v. BELL. *id.* 455. S. P. ANON. *id.* 452. S. P. DOE, D. LEACH, v. MICKLEM. E. T. 1805. 6 East, 486; S. C. 2 Smith's Rep. 499. S. P. MACHIN v. REYNOLDS. M. T. 1821. C. P. 3 B. & B. 121; S. C. 6 Moore, 455.

But, under a bequest of money in trust for A. until 21, then to her own use; but if she should die under 21, then to her children; A. attained 21, and died in the devisee's life-time; held that the children took nothing since the contingency in which they were entitled never happened.

Bequest of 1000*l.* three per cents. to trustees, in trust for A. B. then of the age of twelve years, until she should attain 21; and then to transfer the same to A. B. her executor, &c. to and for their own use and benefit: and, in case A. B. should die under 21, leaving any child, or children, of her body lawfully begotten, then in trust for all and every such child or children, who should live to attain 21, equally; but in case A. B. should die under 21, without leaving any child, or children, or, being such, they should all die under 21, then in trust for three other persons. A. B. attained 21, and married, but died in the life-time of the testatrix, leaving issue two children; and whether these children took any thing by the will was the question.

Per Cur. This case requires no consideration. The devise was to A. B. when she should attain 21; and, if she should die under 21, leaving children, then to those children. But she did not die under 21, and therefore, nothing could pass to them. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the children; but, as she has not, we cannot make a will for her. We are, therefore, of opinion, that the children took nothing under the will; the events on which the limitation, under which they claimed, was to take place, not having happened.

(b) *As to executory devises.**

1. *General rules connected with.†*

1. PUREFROY v. ROGERS. H. T. 1671. 2 Lev. 39; S. C. 2 Saund. 380. S. P. REEVE v. LONG. T. T. 1694. K. B. Carth 310; S. C. Comb. 252. S. P. GOODRIGHT v. CORNISH. H. T. 1693. K. B. 4 Mod. 258; S. C. 1 Ld. Raym. 3; S. C. Skin 608; S. C. 12 Mod. 52; S. C. 1 Salk. 226. S. P. GURNET v. WOOD. 7 Mod. 302.

No devise is executory which can be supported as a remainder.

A testator devised to his wife for life, and to her son, after the death of his mother, if she should have a son; and, if such son should die within age, then

* From the nature of the interest in lands, tenements, and hereditaments, recognised by the municipal laws of this country, no remainder can be limited to take effect after, or rest upon, any estate in fee-simple; because, a fee-simple exhausting all the interest that a donor has, where the whole is granted, there can be no remainder: 10 Rep. 95; 1 Inst. 18; Dyer,

† When one limitation is executory, all the others are so likewise; thus, the several limi-

to the right heirs of the devisor. The testator died without issue; his wife [303] married again, and had a son. It was adjudged that the estate limited to that son was not an executory devise, but a contingent remainder, because the mother had an estate of freehold capable of supporting it.

2. *DOE, D. MUSELL V. MORGAN*. T. T. 1790 K. B. 3 T. R. 762.

The testator devised to B., for life; remainder to C. for ninety-nine years, if he should so long live; and after the several deceases of B. & C., to the heirs of the body of B., but not to descend entirely to B's eldest son, E., but that E. might appoint the same to all his children living at his death; and, in default of appointment, then to his sons, as tenants in common, in tail; remainder to his daughters in like manner; remainder over. B. survived the testator, but died in the life-time of C. On the question, whether the remainder to the heirs of C. was a contingent remainder, depending on the preceding estate of freehold in B., and therefore failed by the death of B. in E.'s life-time, for want of a continuing particular estate of freehold to support it; and that this case differed from *Hopkins v. Hopkins*; Ca. Temp. Talb. 44; since there, B. the first taker, died in the life-time of the testator, and then the freehold limited to him never taking effect, the contingent limitation over vested by way of executory devise; but as the preceding freehold in this case had once vested, the subsequent limitation, which took effect upon it by way of contingent remainder, could never afterwards enure as an executory devise.

3. *WEALTHY V. BOSVILLE*, E. T. 1736. K. B. Ca. Temp. Hardw. 258.

A testator having charged certain legacies on his lands, devised, that in case his son T. should happen to die before he married, or, being married, should have no children, then his lands should remain, and descend equally to his daughters and their heirs, paying, &c.; and, in case both his daughters should die without being married, or, being married, should have no children, then he willed, that all his estate should descend to J. M.; and, at the end of the will, he gave and devised all his estate, real and personal, not already disposed of by his will, to his son T. After the testator's death, his son J., entered, suffered a recovery, and died also without issue; and then the heir of J. M. entered. The question was, whether the devise to J. M. was a remainder, depending on a particular preceding estate in the son and daughters, or an executory devise. Lord Hardwicke said there were two rules which went a great way in determining the case:—First, that no limitation should be construed to be an executory devise, if it could be made good by way of remainder. Secondly, that it was immaterial in a will, which words were first or last, as the construction must be made upon the whole will; and here, in the subsequent part of the will, there was an express devise of all the residue; so that, taking

83; Cro. Jac. 393. But, although the law will not recognise a remainder to take effect after the expiration of a fee, yet by way of indulgence to a man's last will and testament, and in favour of the intention of devisors, where otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be substituted as an alternative in the place of a fee before limited; provided the substitution be to take effect within a reasonable time. Devises of this nature are called executory, because the estate thereby limited to take place, by way of substitution, have no present existence in consideration of law, but merely a capacity of existence, and of being executed, namely, when the contingency upon which they are limited occurs. So, although the policy of the law of England will not permit a freehold in land to be limited to commence at a future time by any conveyance inter vivos upon a principle now grown obsolete; yet, for the reasons suggested, and in similar circumstances, it admits the limitation of a future interest, without a preceding estate to support it, namely, a future interest supported by any preceding freehold.

tations of a devise of one and the same thing shall never be made to operate several ways, namely, some, by way of executory devise, and others, by way of remainder; 4 *Arth.* 309. But a preceding executory limitation may be uncertain, when a subsequent one may be certain; 2 *Ves.* 243. 610; 1 *Sid.* 148; 1 *Ab. Eq.* 188. pl. 8. Where there is a preceding estate limited, with an executory devise over of the real estate the intermediate profits, between the determination of the first estate, and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of; 2 *Ves.* 521. A devise of all the rest and residue of the real estate will, however pass, as well the profits from the testator's death to the time of the estate's vesting, as those from the determination of the first estate, to the vesting of the subsequent one; 1 *Ves.* 285.

the two clauses together, there was an express devise to the son; and it was given by the word "estate," which was sufficient to carry the fee—so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder over; which was an estate tail. But if that were not so clear, yet, as to the daughters, no objection could be raised; for there was a devise to them, and if they died without issue, &c., so that their recovery was sufficient to bar the remainder; and the limitation being clearly good, as a remainder, could not be considered as an executory devise.

4. *DOE, D. SCOTT V. ROACH. M. T. 1816 K. B. 5 M. & S. 482.*

But a limitation, which was originally a contingent remainder, may take effect as an executory devise, in consequence of events happening in testator's life-time; [305]

From this case it appeared that there was a devise to J. N., his heirs and assigns, for ever; that there was the following proviso—"in case of his dying without issue, then the messuages I have before given him and his heirs, after the death of the said J. N. and his wife, to the children of my grand-daughter, M. D. as tenants in common." J. N. died without issue in the testator's lifetime, leaving a widow, who survived the testatrix. Three of the children of M. D. died during the life-time of J. N.'s widow. The court held, that J. N. would, if he had lived, have taken an estate tail, with a contingent remainder to the children of M. D., but that the lapse by his death turned that limitation into an executory devise, which thus only depending on the event of J. N.'s widow's death, was not too remote, as, however, the ulterior limitations expressed an estate of inheritance, in perpetuity, or *quantum* of interest, the children only took life estates, and a vested interest on the death of the testatrix. The shares, therefore, of those who died in the life-time of J. N.'s widow, passed to the heir at law of the testatrix.

5. *DOE, D. FONNEREAU, V. FONNEREAU M. T. 1780. K. B. Doug. 487.*

And, in some instances, even upon the occurrence of subsequent events.*

A testator devised to the heirs male of the body of T., testator's eldest son; (to whom an estate for life had been limited by deed,) and, in default of such issue, to testator's second, third, fourth, and fifth sons, successively in tail male. It was held, that if T. died, leaving an heir male of his body, the limitation to the testator's next son took effect, as a remainder expectant on the estate tail of such heir male; and if he died, leaving no male issue, that took effect immediately as an executory devise.

2. *In what cases allowed.*

(a) *With reference to the property conveyed.*

(a 1) *Estates of inheritance.*

- 1, *DOE, D. BARNFIELD, V. WETTON. H. T. 1800. C. P. 2 B. & P. 324. S. P. GOWER, D. GROSVENOR, V. PIGGOT. 9 Mod. 249. S. P. BATE V. AMHERT. T. Raym. 83. S. P. GIBBONS V. SUMMERS. 3 Lev. 22. S. P. FORTESCUE V. ABBOTT 2 Lev. 202. S. P. SNOWE V. CUTLER. 1 Lev. 135; S. C. 1 Lev. 153. S. P. PLUNKETT V. HOLMES. 1 Lev. 11; S. C. Raym. 28. S. P. WALTER V. DREW. 1 Com. 372. S. P. REED V. HATTON. 2 Mod. 26. S. P. TAYLOR V. BIDDALL. 2 Mod. 292. S. P. MARES V. MARES. 1 Str. 133. S. P. SMITH V. FARNABY. Carr. 53. S. P. GOODTITLE, D. GURNALL, V. WOOD. Willes, 211, S. P. ANDREWS, D. JONES, V. FULHAM. And. 263. S. P. HARRIS V. HARRIS. 4 Burr. 157. S. P. ANON. M. T. 1704. K. B. 6 Mod. 241. S. P. SCATTERWOOD V. EDGE. 1 Salk. 229.*

Estates of freehold partake of the nature of executory devises; first, where the deviser disposes of the whole fee, but up on some future contingency qual ifies that disposition, and devises the estate over to some other person.

A person devised a copyhold estate to his daughter, S. S., and her heirs and assigns, for ever; but if his said daughter should happen to die, leaving no child or children, or lawful issue of her body, living at the time of her death, then he gave, devised, and bequeathed all the said copyhold premises to T. B., and his heirs. Lord Eldon and the other judges of the Court of Common Pleas held, that the whole fee being given to S. S., her heirs and assigns, no further remainder over could be limited upon that fee; and, therefore, the estate given to T. B. was a new fee, limited upon a contingency; that is, an executory devise.

* Sometimes a limitation is so framed as to take effect as a remainder in fee in one event; and an executory limitation, engrafted on an alternate contingent remainder in fee, in another. 2 B. & C. 926; S. C. D. & R. 608.

2. GULLIVER v. WICKETT. M. T. 1745. C. P. 1 Wils. 105.

A person devised lands to his wife, for life; and, after her death, to such child as she was then supposed to be *ensiente* with, and to the heirs of such child for ever; provided, that if such child as should happen to be born should die before the age of 21 years, leaving no issue of its body, the reversion should go to another. Lord Chief Justice Lee delivered the opinion of the Court, that the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee, and a devise over, which was good, as an executory devise; and if the contingency of a child never happened, then the last devise was to take effect, upon the death of the wife.

And this rule holds though the first estate be not vested, provided the ultimate devise be limited so as to take effect in default of the contingency.

Reversion of the estate first devised, on an event subsequent to its becoming vested.

3. CLARKE v. SMITH. H. T. 1698. C. P. 1 Lutw. 313. S. P. GORE v. GORE. M. T. 1735 K. B. 2 Str. 948. S. P. THEOBALDS v. DUFFOY. 9 Mod. 102. S. P. DOE, D. EARL OF CHOLMONDLY, v. MAXEY. 12 East, 589.

Secondly; where the testator, without parting with the

A. devised lands to B., in fee, to commence and take effect six months after the testator's death. This was adjudged to be a good executory devise. Immediate fee, gives a future estate of freehold, to arise either upon contingency, or at a period certain unprecedented by any immediate freehold.

(b 1) *Estates not of inheritance.*

1. WRIGHT D. PLOWDEN, v. CARTWRIGHT. E. T. 1757. K. B. 1 Burr. 282.

LOVE v. WYNDHAM. 1 Mod. 545.

Per Lord Mansfield, C. J. When long and beneficial terms came in use, for the convenience of families required that they might be settled upon a child after the death of a parent; such limitations were soon allowed to be created by will, and the old objections were removed by changing the name from remainders to executory devises. The same reason required that such limitations might be created by deed, as, for instance, marriage settlements, to answer the agreement of parties, and exigencies of families.

See 8 Rep. 95; 10 id. 46; 1 Vern. 235.

(b) *With reference to the period within which the limitation is permitted.*

(a 1) *As to estates of inheritance.*

1. THELLUSON v. WOODFORD. T. T. 1805. Dom. Proc. 1 N. R. 357.

The testator by his will gave his residuary real and personal estate to trustees, upon trust, to invest the personalty in the purchase of lands, and stand seised of the lands, so to be purchased, as well of the testator's own lands, during the lives of his three sons, and the issue of such of them as should be born in his life-time, or in due time afterwards (who amounted to sixteen persons) and the life of the survivor, to lay out the rents in the purchase of other lands, to be settled to the same uses; and after the death of the survivor, the estates to be divided in three lots, and the premises comprised in one lot to be conveyed to the eldest male lineal descendant then living of his son, P. J. T., in tail male, with remainder in equal moieties to the male lineal descendants of and 21 his two other sons, G. W. T., and C. T., in the same manner as thereinbefore directed, with respect to the descendants of P. J. T. with cross remainders; and, in case there should be but one such descendant, then to such one in tail male, with remainder to the use of the trustees, their heirs and assigns, upon the trusts after mentioned. The premises comprised in the other two allotments were directed to be conveyed to the use of the eldest male lineal descendants of his two other sons, in the same manner, with corresponding cross-remainders. And the trustees were directed to stand seised of the estates, in failure of lineal male descendants of the testator's several sons, in trust to sell, and pay the money to his Majesty, his heirs and successors, to be applied to

An executory devise of the class first alluded to, must vest within the compass of a life or lives years.

* A bequest over of a sum of years, after a previous disposition for life, was formerly void; because, an estate for life being of greater estimation, in the eye of the law, than the longest term for years, it was concluded that the limitation of a term for years, to a person for life, was a complete disposition of it; and it was also considered; that the possibility of a term continuing longer than the life of the person to whom it was first bequeathed, was not such an interest as, by the rules of law, could be limited over; 6 Cru. Dig. 433.

† Though to a person not in esse, or not ascertained; 1 Roll. Abr. 613 1 Ab. Eq. 191.

the use of the sinking fund, as should be directed by parliament. The Lord Chief Baron M'Donald, pronounced the opinion of the judges as to certain objections which had been made to the validity of the will. The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law for three reasons. First; because so great a number of lives cannot be taken as in the present instance to protract the time during which the vesting is suspended. Secondly; that the testator has added to the lives of persons who should be born at the time of his death, the lives of persons who might not be born. Thirdly; that after enumerating different classes of lives during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at my decease," or born in "due time afterwards;" and that as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grand-children and great-grand-children, and their issue, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, viz., the number of lives taken, which in the present instance is nine, I apprehend that no case or dictum has drawn any line as to this point which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life, and that in fact the life of the survivor of many persons named or described is but the life of some one. The second objection which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease, those of persons not then born. It becomes, therefore, necessary to discover in what sense the testator meant to use the words, "born in due time afterwards;" such words, in the case of a man's own children, mean the time of gestation; what is to be intended by these words in this will must be collected from the will itself. [308] It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born, during whose lives the trust might legally continue, or, in other words, whom the law would consider as born at the time of his decease. Now these could only be such children of the several persons named as their respective mothers were *ensient* with at the time of his death; or, he may have meant to use the word "due," as denoting that period of time which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time during which a presentation to an advowson mentioned in the will might be suspended without incurring a lapse. The third ground of objection depends upon the application of the restrictive words which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rule of construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law that shall prevail. His intention evidently was to prevent alienation as long as by law he could; if then it is to be supposed that the restrictive words are to be confined to the last of seven different description of persons, and that the testator intended to leave the four description of persons which immediately preceded this seventh class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. With respect to your Lord-

ship's second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled that an estate may be limited in the first instance to a child unborn, and, I apprehend, to the first and other sons in fee as purchasers.

After the opinion of the judges had been delivered, the Lord Chancellor addressed the house as follows: The learned judges having given their opinion upon the points of law referred to them, there is nothing remaining for the consideration of the house except one question, which could no be referred to the judges.—Whether a testator can direct the rents and profits to be accumulated during that period for which he may so make the property unalienable? That he may do so, I take to be most clear. In truth, I speak in the hearing of those who will assent to me when I say, that if the testator had given the residue of his personal estate to such person as should be the eldest male descendant of P. I. T., at the death of the survivor of all the lives without more, that simple bequest would direct an accumulation until it should be seen what person answered the description of that male descendant; and the effect of the common rules of law would have supplied the rest. The course of proceeding would have been to inquire whether the executory devise of the personal estate to such future individual were good; and, if it were good, then wherever the residue was given, the interest and profits would go likewise, there can be no more objection to such person taking the interest than the capital itself. This, therefore, is a case in which the legal doctrine is clear, and equitable doctrine is clear. Whatever may be our regret upon the subject, is it not our duty to determine according to the rules of law and equity? When I put the question whether this judgment shall be reversed, I shall think myself bound to say that I think it ought to be affirmed.—Judgment affirmed.

[309]

And nine months after;* (and anterior to statute 39 and 40 G. 3.† c. 98. the same rule which fixed the period for suspending the vesting of property, regulated also its enjoyment.)

2. *LONG v. BLACKHALL.* H T. 1797. K. B. 7 T. R. 100.

The question in this case was whether a limitation to arise on the failure of issue male living at the death of a child *en ventre sa mere*, and which involved a double allowance of gestation, since issue in the womb, at the death of such child, would be considered as issue "living" at that period, was good? The decision established its validity.

* This limitation was occasioned by the rule, that an executory devise cannot be barred or prevented from taking effect, by any mode whatever. Had it not been adopted, they might have been used as a means of creating perpetuities; 6 Cru. Dig. 408.

† It may be observed that it was lately decided, that the circumstance of the vesting in possession being postponed beyond the prescribed limits, does not affect the validity of a gift, which vests in interest, within those limits. The provision for suspending the possession, in such a case, is simply void; 3 Bing. 153.

‡ This statute, after reciting that it was "expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions" therein-after-contained, enacts, that no person, by deed or will, &c., shall settle or dispose of any real or personal property in such manner, that the rents, or produce, shall be accumulated for a longer term than the life of the settlor; or 21 years after his decease; or during the minority of any party living at his decease; or the minorities of persons beneficially entitled; and any other direction shall be void, and the rents &c. go to the persons entitled thereunto, s. 1. But nothing in this act is to extend to any provision for payment of debts, or for raising portions for children, or touching the produce of timber, s. 2.: nor to any disposition of heritable property in Scotland, s. 3. The restrictions of this act are to take effect, with respect to wills made before the passing of this act, only where the testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this act, s. 4. It has been decided, upon this statute, that if its limits be exceeded, the accumulation is void only for the excess, and not, as in the case of executory limitations, or accumulations, before the statute, void in toto; *Lade v. Holford*, Amb. 479; 3 Burr. 1416; 1 Blackst. 1428. S. C. The principle however, upon which trusts for accumulation are held to be valid pro tanto only extends to those trusts, so far as they are affected by the late statute: for, if they exceed the limits allowed to executory devises, they will, of course, still be void in toto, as before; *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 54; *Marshall v. Halloway*, 2 Swanst. 482. An opinion has been expressed by an eminent writer (see Mr. Preston's Treatise on Abstracts, vol. ii. p. 181. and his note, inserted in Mr. Butler's Fearnie, 538,) that a testator, or settlor, may take each of the periods of accumula-

3. BEARD v. WESTCOTT. M. T. 1813. C. P. 5 Taunt. 393.

On a question, how ever, arising, whether an absolute term of 21 years could be added to a life; the Court of C. P. were of one opinion;

This was a case sent by the Master of the Rolls. A testator devised his freehold lands unto his grandson, J. J. B. and his assignee, during the term of ninety-nine years, if he should so long live: and immediately after his decease, then he devised the same to the first son of the body of the said J. J. B. lawfully to be begotten, and his assigns for the like term of ninety-nine years, if he should happen so long to live; and so on, in tail male, to such first son lawfully issuing, for ever; and for want and in default of such issue of such first son, then to the use of the second and other sons of the said J. J. B. successively, and the issue male of such son or sons, lawfully issuing, for the like term of 99 years only, in case he should so long live. And in case there should be no issue male of the said J. J. B., nor issue of such issue male at the time of his death; or in case there should be such issue male at that time, and they should all die before they should respectively attain the age of 21, without lawful issue male, then to the testator's grandson J. B. for 99 years, if he should so long live; and after his decease to his first son in the same manner as in the former devise, with similar limitations over. And the testator provided that if any of the devisees should assign their interest the lands should go over to the person next in succession. The questions for the opinion of the Court were, first, what estate J. J. B. took; and secondly, whether any, and which, of the limitations over were good?

The Court certified that J. J. B. took an estate for 99 years, determinable with his life; and that upon his death his first son took a life estate; and that the limitation to J. B. and his first son, in case of J. J. B. dying without leaving any sons, or issue male of such sons living at the time of his death, or being such they should die before 21, without lawful issue male, was good.—Further that the other devises, i. e. those to the issue male of the unborn sons, were void; See *Somerville v. Lethbridge*, 6 T. R. 213.

The Master of the Rolls, in consequence of what Lord Anvanley, M. B. had said in *Thellusson v. Woodford*, 4 Ves. jun. 377. "that the period of 21 years had never been considered as a term that might, at all events, be added to such executory devise or trust;" entertained doubts whether the Court had not gone too far, in holding all the limitations good that could take place during a life or lives in being, or within 21 years afterwards; and therefore ordered that the Court should be again attended with the case, with the following additional question: How far the limitations over, in the event of there being no son or sons of J. J. B., nor issue male of such son or sons living at the death of the said J. J. B.; or there being such issue male at that time, they should all die before they attained their respective ages of 21 years, without lawful issue male, were affected by the circumstance that they were to take effect at the end of an absolute term of 21 years, after a life in being at the death of the testator, with reference to the infancy of the person intended to take, or by the circumstance that there might be issue of J. J. B. living at his death to whom the estate was given by the will, but who would be incapable of taking according to the above certificate, for whose death under 21, the limitation over, in the event before-mentioned must await?" In answer to this second question, the Court certified, that the limitations over (following the terms of the inquiry) were not affected by this circumstance.

4. BEARD v. WESTCOTT. T. T. 1822. K. B. 5 B. & A. 801.

[311]
And the Court of K. B. of another.

In a subsequent stage of the cause, which is stated in the last decision, a case was sent to this Court, embodying the substance of the two enquiries sent to the Common Pleas; in answer to which, after a full and able argument the Court certified an opinion that J. J. B. and his first son took estates for 99 years, determinable with their lives, but that all the limitations subsequent to mentioned in the statute; so that he may accumulate for 21 years, and a minority, and, it would seem, for the several minorities; but this view of the subject is at variance with the more generally-received opinion.

* The cause afterwards coming on for further directions, before Lord Eldon, on the conflicting certificates, his lordship observed that, under the circumstances of the case, he thought the best thing he could do, was to confirm the certificate of the Court of King's bench, and

to, and expectant upon, the limitation to the first son were void; *Beard v. Westcott*, 5 B. & A. 801.

5. *ROE, D. MAWSON v. JEFFERY*. E. T. 1793. K. B. 7 T. R. 589. S. P.

MARKS v. MARKS. M. T. 1720. K. B. 1 Str. 179; S. C. 10 Mod. 420.

A person devised a dwelling-house to his grandson T. T., and his heirs for ever; but in case his said grandson should depart this life, and leave no issue, then his will was, that the said dwelling-house, &c. should be and return to E., M., and S., or the survivor or survivors of them. A devise after a general failure of heirs or issue is there fore, too remote.

Lord Kenyon said that nothing could be clearer, in point of law, than that if an estate were given to A. in fee, and by way of executory devise, an estate was given over, which might take place within a life or lives in being, and 21 years and the fraction of a year after, the latter was good, by way of executory devise. The question, therefore, in this and similar cases was, whether from the whole context of the will, it could be collected that when an estate was given to A. and heirs for ever, but if he died without issue, then over, the testator meant, dying without issue living at the death of the first taker. That the rule was settled so long ago as in the reign of James I., in the case of *Pells v. Brown*, Cro. Jac. 590. That case had never been questioned, or shaken, but had been adverted to as an authority in every subsequent case respecting executory devises. It was considered as a cardinal point on this head of the law, and could not be departed from, without doing as much violence to the established law of the land as (it was supposed by the defendant's counsel) the Court would do, if they decided this case against him. [312]

6. *PROCTOR v. BISHOP OF BATH AND WELLS*. M. T. 1794; C. P. 2 H. Bl. 358.

The testator devised an advowson to the first or other son of P. that should be bred a clergyman and be in holy orders, and his heirs; but in case P. should have no such son, then to M. P. died after the testatrix, without ever having had any son. The question was, whether the gift to M. could take place as an executory devise; for as a contingent remainder it could not, for want of a particular estate to support it. Against the devise to M. it was argued, that the devise was not within the limits within which an executory devise was good, viz. a life or lives in being, or 21 years after, because P. had no son born at the testator's death; and if he ever should have had one, such son would not necessarily have been in orders within 21 years after his birth; for by the canons no person could be admitted into deacon's orders before 23, without a faculty, nor could he be made a priest before 24. And the devise to M. it was said was liable to the same objection, on account of the remoteness of the contingency; for supposing there had been no previous devise, the devise to M. would be to him "if P. should have no son in orders;" but no time was fixed for his taking orders, and such devise being void in its original creation, could not be made good by the subsequent circumstance of P. having no son, according to *Goodman v. Goodright*, 2 Burr. 873. 1 Bl. 188; and the Court were of opinion, that the first devise to the son of P. was void, from the thus help the case to the House of Lords, if the parties thought it right to take it there. The inclination of his opinion was, that the Court of King's Bench was right; *Beard v. Westcott*, 1 Turn. 26.

The question again arose, in the case of *Bengough v. Edridge*, sittings after Hilary Term 1826, MSS. before Sir John Leach, V. C. 1 Powell, by Jarman, 394. n. who after hearing a very elaborate argument, expressed his opinion in favour of the limitations of the will. Mr. Jarman (1 Powell, 397. n.) has made some opposite remarks on the absurdity of not allowing an absolute term to be created. He has alluded to cases in which limitations were held good, although extended beyond the minority of the devisee for a few months; and in one case, a year; and from thence, has shown the inconvenience that will arise from denying the authority of the opinion certified by the Court of King's Bench, viz. the splitting of the 21 years into fractions, and then deciding what portion is to be looked upon as the ultimate period to which such a limitation can be protracted. He also advances the argument, which was much depended upon in the cases of *Beard v. Westcott*, and *Bengough v. Edridge*, that from such a hypothesis as relied on by the Court of Common Pleas would follow this necessary consequence, that under the late statute 39 & 40 Geo. 3 c. 98. enjoyment may be postponed for a longer period than the vesting. The question is however, Mr. Jarman adds, likely to be carried to the House of Lords.

uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to M. as it depended on the same event, was also void although P. never had any son, it having been decided in *Chatham v. Tothill*, 6 B. P. C. 451, that no limitation could take effect after a prior devise, which was void from the contingency being too remote.

7. *GOODMAN V. GOODRIGHT*. M. T. 1760. K. B. 1 Bl. Rep. 188; S. C. 2 Burr. 873.

A devise, therefore, after a general failure of heirs or issue, will not, in this case, be supported.

M. M., on the marriage of her niece M. W., who afterwards became her heir at law, with D. W., entered into articles, covenanting to settle an estate for life on M. W., with remainder to the issue of that marriage in tail, with the reversion to herself in fee, whenever D. W. should have settled his own estate to the same uses. M. M. by her will, reciting the articles, gave her equitable reversion in the premises to the heirs of the body of M. M., by any after taken husband; and for want of such issue, remainder over to C. L. in tail.—M. W. died without issue, living her husband. It was determined, that this was a future executory devise of the reversion to the heirs of the body of M. M. by her second husband, during the first marriage, on failure of heirs of her body by her first husband, which was too remote, and therefore void.

[313] 8. *BADGER V. LLOYD*. H. T. 1699. K. B. 1 Ld. Raym. 523; S. C. 1 Salk. 232.

To the rule, that a devise after a general failure of issue is not good, there are, however, the following exceptions: first, in the case of a reversion.

A person conveyed his estate to the use of himself for 99 years, if he should so long live, remainder to his wife in the same manner; remainder to his son in the same manner; remainder to trustees and their heirs, during the lives of the father and son, to preserve contingent remainders; remainder to the first and other sons of the son in tail male; remainder to the father in fee. The father made his will; and, after reciting the settlement, devised the lands, after the death of his son, without issue male, to another son. It was objected that the devise was executory; and, as it could only take effect on the death of the son without issue, it was void, as being too remote. But to this it was answered, that here a man, entitled to a reversion expectant on an estate tail, devised it, after the death of the tenant in tail without issue, to another; this was not an executory, but an immediate devise, and the words "from and after" were only a declaration when it should take effect in possession. If the son had not an estate tail in the land, but the devises had been after the death of a stranger without issue, they would have been executory devises, and void, by reason of the remoteness of the possibility; but here they were limited after the determination of the particular estate.

9. *SANFORD V. IRBY*, T. T. 1820. K. B. 3 B. & A. 654. S. P. *WELLINGTON V. WELLINGTON*. 1 Bl. Rep. 645.

Secondly, in case of a devise in default of issue of the devisor.*

A testator having an estate, which had been conveyed, by the settlement on his first marriage, to trustees, to the use of himself for life; remainder to his first and other sons successively, in tail male; and having one son and two daughters by his first marriage, shortly after his second marriage made his will, and devised to his son all his manors, &c., and personal property, subject to the payment of his debts and legacies: but, in case his son should depart this life without issue male, or in case of failure of issue male of testator's body, he bequeathed to all and every his daughters, who should be living at the time of his death, or born in due time afterwards, 40,000*l.*, equally to be divided amongst them, in addition to what they might be entitled to under the marriage settlements of their respective mothers; and, if only one daughter, then he bequeathed 20,000*l.* to her. He then charged his estates with the

* So an executory devise over for life, to a person in esse, to take place after a dying without issue of the first devisee, may be good; because the future limitation being only for the life of a person in esse, it must necessarily take effect during that life, or not at all; and, therefore the failure of issue in that case is confined to the compass of a life in being; *Fearne's Ex Dev.* 279. There are also several cases in which the Courts have supported a devise over after a general failure of heirs or issue, by raising an estate tail by implication in the person, on the failure of whose heirs, or issue, the estate is devised over; for in that case, the second devise is supported as a remainder, expectant on the determination of such prior estate tail; 6 Cru. Dig. 432.

payment of these sums, and devised them to A and B. their heirs, &c., without impeachment of waste, upon trust, by sale or mortgage, to raise a sufficient sum to pay those legacies with interest; and he then devised the remainder of his lands, manors, &c. as should not be sold by the trustees for that purpose, for want, or in failure of issue male of his body, as aforesaid, unto his brother for life, with different remainders over. The testator had no children by the second marriage; and, his only son by the first marriage having died under age, unmarried, and without issue, the court held, that the surviving daughters took no estate, by descent, in the hereditaments devised by the will; and, secondly, that if the devise to A. and B. had been of a power to raise money by sale, and not of a legal estate, that the testator's brother would not have taken an estate for life, with remainders over; and, thirdly, that, under the will, A. and B. took an estate in fee.—See *Ca. Temp. Talb.* 262; 4 *Mod.* 316; 4 *Burr.* 2165; 6 *Bro. Parl. C.* 58; 12 *East*, 253; 4 *Bro. Ch. Rep.* 441. [314]

(b 1) *Estates not of inheritance.*

1. *LOVE v. WYNDHAM.* H. T. 1670. K. B. 1 M. d. 50; S. C. 1 Vent. 79; S. C. 1 Lev. 290. S. P. *BURFORD v. LEE.* K. B. 2 Freem. 210.

A person devised a term, for years, to his wife for life; and, after her decease, to N., his son, for life; and if N., his son, should die without issue of his body begotten, then he devised it over to B. The whole court was unanimously of opinion, that the bequest to B. was void; for that, as he could not take until the death of N. without issue, it was the same in effect as if it had been to N. and the heirs of his body, with remainder to B, which would have been clearly bad; because, after a term was devised to one, and the heirs of his body, no other limitation, nor any appointment of it, by way of executory devise, could be made; for the law would not presume any term to have continuance, so long as issue of the body might continue; and therefore a limitation after an indefinite failure of issue, depended upon too remote a possibility.

2. *LONG v. BLACKHALL.* H. T. 1797. K. B. 7 T. R. 100. S. P. *GOODTITLE v. D. GUENELL.* v. WOOD. id. 103. n. S. P. *LAMB v. ARCHER.* T. T. 1693. K. B. Comb. 208. S. C. Carth. 266.

Testator, after certain intermediate devises, which expired, gave leasehold lands to the child with whom his wife was then *ensiente*, if a son, (as it afterwards proved,) during his life; and, after her decease, then to such issue male, or the descendants of such issue male of such child, as, at the time of his death, should be his heir at law; and if, at the time of the death of such child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then he bequeathed the same to A. The testator died before the birth of the son, who died without issue. The court were of opinion, that the devise to A. took effect, because it is an established rule, that an executory devise is good, if it must necessarily happen within a life, or lives, in being and 21 years, and the fraction of another year, allowing for the time of gestation. [315]

- 3 *WILKINSON v. SOUTH.* E. T. 1798. K. B. 7 T. R. 555.

The testator devised a term to A for her life; and, after decease, to go to B. and the heirs male of his body lawfully begotten, and to their heirs and assigns, for ever; but, in default of such issue, then, after his decease, to go to C., his heirs, and assigns, for ever. B. died without having ever had issue. The question was, whether C. took any thing under the devise?

Per Cur. If personal property be so limited that, if it were an estate of inheritance, it should give an estate tail, the absolute interest vests in the first taker. But, if the limitation be with a double aspect to A, and to the issue of his body, then over, it is a good limitation. It therefore depends on a matter of construction, whether the testator meant an indefinite failure of issue of B., or on a failure of issue living at the time of the death of B. What are the words of the devise? "To B. and the heirs of his body, and to their heirs and assigns, for ever." If that had been all, B. could have had the absolute interest. But they are controlled by these words, "but, in default of such issue, then, after his decease, to go to C.;" that clearly show that the testator of the per

On this point, a similarity of construction prevails between exco- tory be- quests of terms for years, and executory devises of estates of inherit- ance. Such estates can not, there- fore, be lim- ited upon a general fail- ure of heirs or issue;

Unless such failure is confined to the period allowed.

But the Courts have very much in- clined to lay hold of any words in a will, to restrain the generality of the words "dy issue," and confine them to dy issue living at the time of the per

son's devise in order to support the intention of the testator, by which construction the devise over becomes valid, being confined to the period of a life in being.*

[316]
Where, therefore, a term was bequeathed "to A. and his lawful heirs; and if he die and leave no lawful heir, then to B.;" the limitation to B. was holden good.

meant that, if B. left no issue, then the estate should vest in C.; and that is within the rule applicable to executory devises, which says, that a devise is good, if it may take place after a life, or lives, in being, and within 21 years and the portion of another year afterwards. Consequently, we must certify, that C. takes an absolute interest. See 1 P. Wms. 432; 3 id. 258; 17 Ves. 479; 1 Meriv. 20; 2 Eden, 202; 2 Bro. C. C. 543.

4. GOODTITLE, D. PEAKE, v. PEGDEN. M. T. 1788. K. B. 2 T. R. 720.

A person, possessed of a term for years, bequeathed it to his grandson, T. B. P., son of D. & S. P., and the heirs lawful of him, for ever; but, in case he should happen to die, and leave no lawful heir, then, and in that case, he gave it, after the death of the said T. B. P., to the next eldest son, or heir, of the said D. & S. P. T. B. P. took possession of the term in question, under the will, and died without issue.

Lord Kenyon said: that, on conference with the rest of the Court, they were clearly of opinion, that the limitation over was good. This was a chattel interest, limited to T. B. Peake and the heirs lawful of him, for ever; but, in case he should happen to die, and leave no lawful heir, then over. Now, it was apparent on the will, that the testator, by lawful heirs, meant heirs of the body; and that, having no lawful heir, must be confined to leaving no issue at the time of his death.

3. Distinction between, and contingent remainders.†

4. As to limitations over, after an executory devise of the whole interest.‡

* And in devises of terms there is no distinction between words giving an express estate tail, or by implication; Fearn. Ex. Dev. 233; 1 P. Wms. 433; 3 P. Wms. 263; nor between a devise to one for life expressly, and if he die without issue, remainder over; or to one indefinitely, and if he die without issue, remainder over: *Clare v. Clare, Forrest*, 21; *Fearn's Ex. Dev.* 275.

† The essential quality in executory devises which gives the distinction between them and contingent remainders its chief importance, is this; that such interests are not, in general, liable to be affected by any alteration in the preceding estate; *Pells v. Brown, Cro. Jac.* 590; while on the other hand, as it is essential to contingent remainders that they take effect at the instant of the determination of the preceding estate, it follows as a consequence of this rule, that any act by the owner of that estate, which amounts to a forfeiture of it, effects the destruction of all the dependant contingent remainders, placing them in the same situation as if the preceding estate had regularly expired before their vesting. Hence the practice, at this day, of interposing a vested estate in trustees, between the particular estate and the contingent remainders, and which, by giving a right of entry to the owners of that estate, on the forfeiture of the preceding estate of freehold, preserve the ulterior remainders. Hence too, the necessity of restraining executory interests, in regard to the period of their taking effect; though it is to be observed, that the same limits are imposed on contingent remainders, notwithstanding their destructibility; 2 *Powell, by Jarman*, p. 243. Thus in the case of *Pells v. Brown, Cro. Jac.* 590. T. entered on the estate devised to him, and suffered a common recovery; but all the judges, except *Doddridge*, held that the recovery did not bar the executory devise; for T., the person who suffered the recovery, had a fee; and W. B. had but a possibility, if he survived T.; and T. dying without issue in his life, no recovery in value should ensue thereto, unless he had been a party by way of vouches. A person granted several annuities, by deed, to his younger children; and afterwards devised all his lands to his elder son and his heirs, upon condition that he paid the annuities, and if he failed of payment, that the younger son should enter and have them. The elder son entered, and made a feoffment; and then the younger son entered for non-payment. It was held that this entry was lawful, the contingent estate not being divested by the feoffment; *Palmer*, 136; It was resolved in *Manning's case*, 8 Rep. 94; and also in *Lampet's case*, 10 id. 47; that in bequests of this sort, after the executor has assented to the first bequest, it is not in the power of the first taker to bar the bequest over, or executory devise, for he cannot transfer more to another than he has himself. Mr. *Fearn*, Ex. Dev. 55. says, it seems to follow, as a consequence of this exemption of executory interests from the power of the first devisee or legatee, that where there is an interest devised to one for life, &c. out of a term, and then an executory devise over of the residue of the term to another, any subsequent union of the freehold or inheritance with the interest so given to the first devisee, or a feoffment, or other act of forfeiture by such first devisee, will not extinguish or affect the interest of the ulterior devisee; for if it could, the executory interest might easily be annihilated, without any prejudice to the temporary interest of the first devisee, by collusion betwixt him and the reversioner.

‡ It seems now to be settled, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years, and some months after the death of a

5. *As to cross-remainders connected with.**

[317]

7. *Estates conditional.†*

(a) *General nature of, and whether precedent or subsequent.*

1. *ACHERLEY v. VERNON*. E. T. 1739. C. P. Willes; 153. S. P. *LONG v. DENNIS*. E. T. 1767. K. B. 4 Burr. 2052. S. P. *PAGE v. HAYWARD*. K. B. 2 Salk. 570. S. P. *FREAK v. LEE*. E. T. 1679. 2 Show. 37; S. C. 2 Lev. 249; S. C. Jones, 113.† S. P. *ONGLEY v. PEELE*. H. T. 1712. K. B. 2 Ld. Raym. 1312 S. P. *FRY'S CASE*, E. T. 1672. K. B. 1 Vent. 202.

T. V. devised to his sister E. A. a rent-charge, to be paid half-yearly out of the rents of his real estate, during her life; and by a codicil declared, that what he had given to her should be accepted, in satisfaction of all she might claim out of his real or personal estate, and upon condition that she "release" all her right or claim there to his executors. The Court held it was a condition precedent; and that an action, which the husband as administrator had brought for the arrears, could not be sustained. Willes, C. J. observed, that no words necessarily made a condition precedent or subsequent, according to the nature of the thing, and the intent of the parties. If, therefore, a man de- person then existing, may be good in event, if no one of the preceding executory limitations which would carry the whole interest, happens to vest. But when once any preceding executory limitation which carries the whole interest happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested; 1 Vern. 231; 1 P. Wms. 93; 1 Salk. 156; 2 P. Wms. 686. But in these foregoing cases, it will be seen, by a reference to the books, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation upon the preceding, and to take effect after it, but as an alternative, substituted in its room, and to take effect only in case the preceding one should fail, and never take effect at all; and where a preceding executory limitation did not carry the whole interest, a subsequent one was considered either as becoming vested in interest, as a remainder, expectant on the preceding estate, as soon as that took effect, or else as taking effect in possession at the time limited for the preceding estate to vest, in case that preceding one failed of taking effect. So that in either case it follows, that if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the time limited for the first, or else not at all. It was therefore necessary to distinguish between instances of this kind and those cases wherein either the preceding limitation is not executory, but vested, or there is no preceding limitation at all; for in either of such cases the future limitation cannot be merely an alternative, but it is absolutely limited to take effect, either after the expiration of the preceding limitation, or else, if there be no preceding limitation, upon the happening of some future event; and therefore if the expiration of that preceding limitation be of too remote a nature, the future limitation is void in its creation and no subsequent accident can make it good; because it is not, as in the former cases, limited to take effect or fail upon the event of a contingency which must be determined, one way or other, within the period allowed by law for the vesting of an executory devise; but is limited absolutely, to take effect on an event which may not happen within such a period; *Forrest*, 245; 2 Burr. 878.

* Greater latitude is given by the Courts to the implication of cross remainders in executory trusts than in direct devise; 1 Ves. jun. 102; 17 Ves. 67. In the case of *Horne v. Barker*; *Coop.* 257; where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of twenty-one years, or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, with cross remainders over; and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M. R. held that cross remainders were to be inserted, not only as between the children respectively, but also as between the families.

† A condition in general avoids or determines the whole estate to which it is annexed; and the benefit of a condition can only be reserved to the donor and his heirs, not to a stranger. In consequence of this doctrine, no remainder could be limited on a condition: 1st. Because such condition would operate so as to abridge the particular estate. 2d. Because the entry of the donor, for the condition broken, would defeat the remainder. It has however been long settled, that where in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance thereof, the estate is devised over to another, the condition shall operate as a limitation, circumscribing the measure and continuance of the first estate; that, upon the breach or performance of it, as the case may be, the first estate

‡ In this case there was a devise of legacies, to be paid out of lands; then the lands were devised by the same will to J. S.—the Court held that though it was not said that J. S. should pay the legacies, yet he took by the devise conditionally.

vised one thing in lieu or consideration of another, or agree to do any thing, or pay a sum of money in consideration of a thing to be done, in these cases, that which was the consideration was looked upon as a condition precedent. There was (he said) no pretence for saying, in the present case, that the devisee could not perform the condition before the time of payment of the annuity; for the first payment was not to be until six months after the testator's decease; and she might as well release her right in six months, as at any future time.

2. GULLIVER D. CORRIE, v. ASHEY. M. T. 1766. K. B. 4 Burr. 1929; S. C. 1 Bl. Rep. 607. S. P. EDWARDS v. HAMMOND. T. T. 1683. C. P. 3 Lev. 132.

Or subsequent; according to the nature of the subject to which they [319] are applicable, and the intent of the parties.*

W. devised his estate unto D. W. for life; remainder to S. and the heirs male of his body lawfully begotten; and for the want of such issue, to the heirs male of the body of D. W., and the heirs male, &c.; and for want of such issue, remainder over. Provided always and upon the express condition, that the persons upon whom the estate should descend and come, did, and then should, change their names, and take the testator's. And he did also declare, that his several devises of his said estates were likewise on the express condition, that no person should plough or commit any waste on the premises, &c., by felling trees (unless for necessary repairs) or otherwise, but should forfeit the premises and ground upon which the tree should be so fallen, or on which such waste should be committed, to the person who should be next entitled to the premises according to his will. And then followed a devise of the places wasted to the persons next in remainder. The testator died, leaving D. W. and his nephew S. his heirs at law. D. W. afterwards entered, and died; then S. entered; and held the estate for about three years, and then suffered a recovery, and aliened it, but never changed his surname, nor took the name of the testator. Afterwards one of the subsequent remainder-men in tail entered on the alienee of S. for a breach of the proviso, by S. not changing his surname, as required by the testator. And one question was, whether the taking the name was a condition subsequent, of which the heir might take advantage, or a conditional limitation, the breach of which divested the estate.

Per Cur. This was not a conditional limitation. It was clearly not an express limitation; and an implication of one could only be made in order to effectuate the testator's intention, and must be a necessary implication to that purpose. Now here it was not so, nor should such an implication be made upon a limitation after estates tail.

shall *ipso facto* determine and expire, without entry or claim; that the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger, and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself; and limitations of this kind are properly called conditional limitations. There is a limitation of another kind, which may be considered as an exception to the rule at common law, that an estate limited to take effect on a condition, which is to affect the particular estate, is void: namely, those cases where a particular estate is limited, with a condition that, after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited shall have a larger estate; see 1 Roll. Abr. 472. 474; Fearn. 270. 407. 409.

* As to condition being precedent, or subsequent, the following conclusions are drawn by Mr. Jarman:—That the argument in favour of the condition being precedent is stronger where a gross sum of money is to be raised out of land, than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue; where the nature of the interest is such as to allow time for the performance of the act before its usufructuary enjoyment commences, than where not (*Acherley v. Vernon*, Willes. 157;) where the nature of the condition admits of its being performed *instantly*, than where time is required for the performance; *Gulliver, d. Corrie, v. Ashley*, 4 Burr. 1940; but that, on the other hand, the circumstance that a definite time is appointed for the performance of the condition, but none for the vesting of the estate, favours the supposition of the condition being subsequent: *Thomas v. Howell*, 1 Salk. 170.

(b) *As to Particular conditions.**

(a 1) *In restraint of residence.*

1. *DOE, D. DUKE OF NORFOLK AND IBBOTSON, v. HAWKE.* T. T. 1802. K. B. 2 East, 481. A condition annexed to the bequest of a farm, that the devisee shall not dispose of, or sell it to any other person; but if he refuses to do so, the sheriff shall sell it to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution. It appeared that C. D. had left the premises, and ceased to dwell there on the day of the execution before the sheriff entered. The question was, whether the estate of C. D. was determined, and the remainder-man consequently entitled to enter. [320]

A. B. gave by his will his tenant-right, which he held by lease, to C. D., but not to dispose of or sell it; and if he refused to dwell there, or keep it in his own possession, then that E. F. should have his tenant-right of the farm. C. D. having borrowed money, left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and, having also given a judgment to another creditor, who issued an execution against him the sheriff sold the estate to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution. It appeared that C. D. had left the premises, and ceased to dwell there on the day of the execution before the sheriff entered. The question was, whether the estate of C. D. was determined, and the remainder-man consequently entitled to enter.

Per Cur. When the lease was deposited as a further security for the money advanced, was not this a voluntary act? and when the lease was afterwards delivered over to another creditor, who took up the first demand, and to whom a warrant of attorney was at the same time given, and, considering that by giving up the lease he thereby disabled himself from mortgaging the premises, and by giving the warrant of attorney, he enabled the creditor to dispossess him at his option; must he not be taken to have contemplated at the time the legal consequence of those acts which afterwards ensued? That these were voluntary acts there can be no doubt; and therefore a manifest intention to depart with the estate, has been established. See 6 T. R. 684; 8 id. 300.

2. *ROE, D. SAMPSON, v. DOWN.* E. T. 1787. K. B. 2 Chit. Rep. 529.

This was a devise of premises for life to testator's wife, "in case she should choose to live and reside therein;" and after his decease to his son; "but in case his said wife should not choose," &c., then he devised the same in trust for sale. It appeared that the widow had expressed an intention of residing there, but died before she could carry her intention into effect. The Court held, that the son was entitled, and said: the wife's intention to reside on the premises is sufficient, provided the intention would, circumstances permitting, have been carried into effect; and as evidence to that effect has been brought forward, it is sufficient.

(b 1) *To assume a certain name.*

- DOE, D. LUSCOMBE, v. YATES.* H. T. 1822. K. B. 5 B. & A. 544; S. C. 1 D. & R. 187.

A. B. by his will, devised his estates, in trust, to his nephew, C. D. for life, he "taking and using testator's surname," subject, as to some part of the premises, to a charge, and to the powers and remedies appointed for the recovery of the same; and from and after the forfeiture, or other determination, of such estate for life, to trustees, in trust, to preserve contingent remainders; and first to the use of the first son of his nephew, and the heirs male of his body, lawfully to be begotten, "taking and using testator's surname, as and for his and their own surname;" and, in default of such issue, to the use of the second, third, fourth, fifth, and all and every other son and sons of the body of his said nephew, and the heirs male of their respective bodies, severally and in succession "taking his surname;" and in default of such issue, then to their mother, E. F., for life; remainder to his niece, G. H., for life; remainder to the heirs male of her body; remainder to his cousin, I. J. for life; remainder to the first and other sons of the latter, in like manner as to the first and other sons of the first devisee, each taker and their heirs respectively "taking and using testator's surname;" remainders over to persons of the testator's name, with an ultimate remainder to his own right heirs. Then followed an express provision, that the heirs male of the several body and bodies of E. F., the mother of the

* Under the title of "Condition" (*ante*, vol. vi.) the general doctrine of invalid conditions, by being illegal (p. 57 to 59.) repugnant (p. 59 to 61.) impossible (p. 61 to 62.) uncertain (p. 62.) and their effect, has been fully considered.

[321]
care their
names to
be altered
to Lus-
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first devisee, G. H., his niece; and that his cousin, I. J., and the heirs male of his body, and each and every of them respectively claiming under the will, should take upon himself, or themselves, the name of Luscombe; and should, within three years next after obtaining possession of the estate, get and provide his and their own name and names to be altered to the name of Luscombe, by act or acts of parliament, or some other effectual way for that purpose; and should for ever after use, and bear that name; and, in case of negligence in this respect by such person or persons respectively, then the limitation to the defaulter to become absolutely void, and go over to the next remainder-man complying with the said proviso. The first devisee, before he came of age, or was let into possession of the estate, took upon himself the name of Luscombe, and had, ever since, borne and used it, but had never obtained any act of parliament authorizing him to change his name. The question was, whether such devisee was entitled to the estate. The Court held that he was; and said: we would not be understood to say that, where a testator requires a name to be taken by act of parliament, or other specified mode, any mode falling short of the specified mode may be substituted for it; or to say, that under this particular will, a voluntary assumption of the name after the party became possessed of the estate, would be sufficient. All we mean to say is this; that as the testator has annexed no express qualification to the words "bearing the surname of Luscombe;" and the word "surname" is manifestly not used in this will in its primary and etymological sense, a name inherited from the father; and, as a bearing *de facto* answers every useful purpose that could be obtained under the authority of an act of parliament, a bearing *de facto*, though by voluntary assumption, is sufficient to satisfy the general and ordinary meaning of the words "bearing the surname," and we cannot say, with certainty, that the testator intended any thing more, or meant to use the words in that qualified and restrained sense, which must be given to them in order to bring the party within the description of persons mentioned in the proviso, so as to pronounce that the condition has been broken, and that the estate shall pass over to another claimant. See 2 Bro. P. C. 2d edit. 272; 6 East, 58; 1 Taunt. 573; 16 Ves. 491; 3 M. & S. 271; 12 East, 141; 4 T. R. 13; and Pinkey v. The Inhabitants of East Hundred, in the county of Rutland; 2 Saund. 379; S. C. 2 Keb. 821.

(c. 1) *In restraint of alienation.*

1. DOE, D. GILL, v. PEARSON. H. T. 1805. K. B. 6 East, 172; S. C. 2 Smith's Rep. 295. S. P. FRIEND v. BOUCHIER. M. T. 1614. K. B. 1 Skin. 242.

A partial
restraint on
the aliena-
tion of a
tenant in
[322]
fee may be
imposed.*

In this case there was a devise of lands to A. and B. two sisters, and their heirs, for ever, upon this condition, that, in case they, or either of them, shall have no lawful issue, they, or she, having no lawful issue, shall have no power to dispose of her share, except to her sister or sisters, or to their children; and all the rest, &c. of my real, &c. estates, not herein-before disposed of, the testator gave to the said A. and B., their heirs, executors, and assigns.

The question was, whether such condition annexed to the estate was good in point of law. The Court said: we think that the condition is good; for according to the case of Daniel v. Abley, in Sir Wm. Jones, 137 and in 1 Latch. 9. 39. 134. though the judges did not agree as to the effect of a devise "to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased," Jones, J. thinking it gave an estate for life, with a power to dispose of the reversion among the sons; the other judges, according to his report, thinking it gave her a fee simple, in trust, to convey to any of her sons; yet, in that case, it was not doubted but that she might have had given her a fee simple conditional, to convey it to any of the sons of the deviser; and if she did not, that the heir might enter for the condition broken; which estate Jones thought the devise gave, if it did not give a life estate, with a power of disposing of the reversion among the sons. And, according to Latch. 37. Doddridge,

* But if a devise in fee be made, upon condition that the devisee shall not alien, the condition is void; Co. Lit. 206. b. 223. a.

J. said: that he conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children; and concluded his argument on this point by saying, that "her estate was a fee, with a liberty to alienate it, she would; but with a condition, that if she did alienate, then she should alienate to one of her sons. And in Dylson's Reports, 58, there is a case to this effect: "A devise to a wife, to dispose and employ the land to herself and her sons, at her will and pleasure;" and Dier and Walsh held, she had a fee simple; but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give to one of her sons. These cases show, that the devise in question, may operate as a devise on condition.

2. *PIERCE V. WIN.* M. T. 1677. K. B. 1 Vent. 321. S. P. *DOE, D. TURNER, V. KITT.* E. T. 1792. K. B. 4 T. R. 691.

In this case the Court held, that conditions restraining alienation by tenants in tail, were void, as repugnant to his estate, to which a right to bar the entail; and to the remainders, by suffering a common recovery; and the issue in tail, by fine by statute 4 H. 7. c. 21; 32 H. 8. c. 36; that is, a fine, with proclamation; is inseparably incident.* See 1 Ed. 404; 2 id. 330; 5 Ves. 458.

3. *REX V. ROBINSON.* E. T. 1811. Ex. Wightw. 386.

A. bequeathed an annuity to B. as an unalienable provision, for his personal use and support, not subject to be anticipated or alienated, or liable to his debts, control or engagements; with a proviso, that if B. should sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate the said annuity, or should do, or execute any act, deed, matter, or thing, to charge, alienate, or affect the same, it should thereupon be suspended. Macdonald, C. B. held, on the authority of *Dommett v. Bedford* 6 T. R. 684. and *Doe, d. Mitchinson, v. Carter* (8 T. R. 57.) that the seizure of the annuity under an outlawry, at the suit of the crown, arising merely from the negative, and not the positive acts of the party, was not a forfeiture on the words of the bequest, which required a positive act. He considered the words, in the present case, were not so large as in *Dommett v. Bedford*, but were more conformable to those in *Doe v. Carter*.†

(d 1) *In restraint of marriage.*

1. *DOE, D. DEAN AND CHAPTER OF WESTMINSTER V. FREEMAN.* M. T. 1786. K. B. 1 T. R. 339; S. C. 2 Chit Rep. 493. S. P. *CARR V. THE EARL OF ERROL* H. T. 1805. K. B. 6 East, 58; S. C. 2 Smith's Rep. 575. *WILLIAMS V. FRY.* H. T. 1671 K. B. 1 Mod. 86; S. C. 2 Lev. 21; S. C. 2 Keb. 756; S. P. *OSBORNE V. WALLEEDEN.* M. T. 1670 K. B. 1 Mod. 272; S. C. 2 Keb. 712; S. C. 2 Saund. 197. S. P. *LUXFORD V. CEEKE.* T. T. 1683.† C. P. 3 Lev. 125. S. P. *BARKER V. SURETEES.* M. T. 1714. K. B. 2 Str. 1175. S. P. *GARBUT V. HILTON.* 9 Mod. 210. S. P. *THOMAS V. HOWELL.* M. T. 1691. K. B. 4 Mod. 67. S. P. *ASLABLE V. RICE.* 8 Taunt. 459.

The testator by devise gave to his wife, J. W. all his copyhold tenements for and during the term of her natural life, provided she remained a widow, and did not marry a second husband. But in case she married another husband, he gave all those tenements to his nephew, J. S. when he shall attain

* Upon the principle that property cannot be given divested of its legal incidents, it is clear that no exemption can be created, from its liability to the debts of the donee; and as a consequence, it cannot be settled upon him as to be unaffected by bankruptcy, which is a transfer, by operation of law, of his whole estate; though it is equally clear, that the interest of the donee may be made to cease on that, as well as on any other event; 2 Stra. 947; 18 Ves. 429.

† But taking the benefit of an insolvent act is a voluntary alienation; certain acts on the part of the insolvent, such as the delivery of a schedule, &c., being of themselves voluntary acts. And now, by the late bankrupt act, 6 Geo. 4. c. 16., the legislature, in admitting declarations of insolvency by the trader himself to be acts of bankruptcy, has given to bankruptcy, in these cases at least, the character of a voluntary act.

‡ It was held, in this case, that, if a devise be made of a rent-charge to a woman "for life, and if she marry, his executors shall pay her 100l. and the rent-charge shall cease, and return to the executors," the rent-charge shall not cease on her marriage, until the 100l. be paid.

But conditions restraining alienations by tenants in tail are repugnant to his estate.

When the language of a clause restrictive of alienation does not extend to an alienation in *ipsum*, it seems that the fact of the property being become disposable under a judicial process issued out against the devisee, does not occasion a forfeiture.

Limitations in restraint of marriage are not to be favoured; and whenever an estate is given to a

widow for life, provided she should not marry, unless there be a devise over, immediately it is merely in *terrorem*.

[324] But where lands were devised to A. in fee, with an executory limitation over if she married with any person born in Scotland, or of Scotch parents, the devise over was holden valid.

his full age of twenty-three years, to have and to hold, unto him and his assigns. It was contended, that the estate which was devised to J. W. determined, upon the marriage with her second husband, it being given to her on condition of her continuing a widow, and that it either vested immediately in J. S. the nephew, or it descended to the heir at law, till J. S. attained the age of twenty-three years. But the court said, that her interest was not determined, but that she was entitled till J. S. attained twenty-three, because the intention of the testator was, that if the widow did not marry, she was to enjoy the estate for her life, if she did marry, she was then only to have it till J. S. attained twenty-three.

2. PERRIN v. LYON. M. T. 1807. K. B. 9 East. 170.

A. B. devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue, to pay sufficient for the maintenance, education, and support of his only daughter, *until she should attain the age of 21 years, or marry*; and when she should attain 21 or marry, then to her in fee; but in case his daughter should *die under age, and unmarried*, then the estates to go to his wife for life, and after her decease, *to the two children of his nephews*, as tenants in common, in fee; with a proviso, that if either his wife or daughter should marry a *Scotchman*, or any person *born of Scotch parents*, then his wife or daughter so marrying, should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry, *should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead*. The daughter while under age married a Scotchman, and died, leaving a son. It was urged that the limitation took effect immediately on such marriage. In support of such position, three points were taken by the counsel. 1. It was maintained, that nothing could be urged in opposition to the legality of the proviso, in restraint of such a marriage; that though by the civil and cannon laws restraints of marriage are in general discouraged and held void, yet even those laws admit of exceptions to the general rule, as if the condition be only temporary, as not to marry before the age of 21; or if it only excluded marriage with particular persons, or in a particular place; and that restraints of marriage have always been admitted by the law of England of real estates, *and a fortiori* where there is a devise over: 2. That the condition was good, for the devise to the daughter was, *when she should attain 21, or marry*; therefore, as soon as she had attained 21, the estate would have become absolute in her in fee, and not liable to be divested by any marriage she might subsequently have contracted; that the restraint of marriage therefore with a Scotchman only operated upon her until 21: and 3dly, that in the event of the prohibited marriage, the estate was directed to "*descend to such person or persons as would be entitled under his will, in the same manner as if his daughter were dead*," and that taking such clause into consideration, and remembering that in case of the decease of his daughter "*under age and unmarried*," (by which latter must necessarily be understood *unmarried to any person not prohibited by him*), the testator had before expressly devised the estate over to the two children of his nephew, as tenants in common, in fee; he evidently considered his daughter's marriage with a Scotchman as equivalent to her death, unmarried; otherwise that which was to give effect to the limitation over would be made to defeat it. The court agreed with the principles to be derived from the foregoing arguments, and certified to the Chancellor who had requested their opinion accordingly.

See Swinb. part 4 sec. 12; Com. Rep. 726, 735, &c.; 1 Mod. 86; 300; 1 Ch. Ca. 142; 2 id. 26, 109; 2 Lev. 21; T. Raym. 236; 1 Vent. 199; 1 Atk. 361; Ca. Temp. Talb. 212; Willes. 83; 3 Atk. 330; 2 Bro. Ch. Ca. 431; 3 Ves. jun. 89; 1 T. R. 389; 2 Eq. Ca. Ab. 393; 2 Dick. 721; 1 T. R. 118; 4 East. 190; 2 P. Wms. 517; 1 Eq. Ca. Abr. 112; Prec. in Ch. 348; 1 Wils. 21; 2 Show. 391; 1 Bl. Rep. 519; 1 N. R. 313; Wilmot, 369, 370, 374; 4 Burr. 2055.

A condition to marry

3. LOWE v. MANNERS. T. T. 1822. K. B. 5 B. & A. 917.

R. Lowe, by will, devised all his landed estates to trustees, and bequeathed.

10,000*l.* as a portion to his daughter, C. L., but in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married, certain estates therein specified, he taking the name of Lowe, and settling upon her an annuity of 1,000*l.* a year during her life; and in case that circumstance did not take place with his daughter, C. L., he then directed that it might be offered to his other daughter, A. L., in every particular; and in case neither daughter should marry in the manner above-mentioned, then he directed that his daughters should have 10,000*l.* each, and in that case he gave all his estates to W. D., his kinsman, for ever, on his and his heirs taking the name of Lowe irrevocably. After the date of this will, C. L. married one W. H., who was not one of the persons named in the will who would have become entitled to the estate after she married him, and the testator paid her a marriage portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband, W. H. might have to any of his real and personal estates, by virtue of his marriage with his daughter, C. L. and by virtue of his said will; and in lieu thereof he bequeathed unto each of their children a pecuniary legacy, and he then directed that in case his other daughter should marry either of the persons mentioned in his will, then upon condition that either of those persons whom she married, and his heirs would take the name of Lowe only, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter, A. L., should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use, the name of Lowe, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter A. L. soon after married T. F., who was not one of the persons named in the will who would have been entitled to the estate, in the event of her having married him, and upon that occasion the 10,000*l.* was paid to her, and W. D. then entered upon the testator's estates, and took upon himself the name of Lowe, and suffered a recovery. The Court held that the daughter had not the whole of her life to perform the condition; and that, therefore, W. D. was seized of an indefeasible estate in fee-simple in the estate in question.

4. *LONG v. DENNIS*. E. T. 1767. K. B. 4 Burr. 2052; S. C. 1 Bl. Rep. 630.

A person devised his estate to trustees to the use of his son Robert for life; remainder to the wife of such son for life; remainder to the first and other sons of his said son in tail, with a proviso, that if the son should marry any woman not having a competent marriage portion, or without the consent and approbation of the said trustees, their heirs and assigns, in writing, under their hands and seals, first had and obtained, then his trustees immediately after the decease of his son should stand seized of the premises, to the use of the testator's two daughters; and he declared that the said proviso in condition was not intended by him, or to be construed, or taken to be, *in terrorem*, but a condition in want of performance whereof in every respect the estate should in no case be vested in his son, nor the heirs of that marriage. The son married a woman who had a competent portion, but without the consent or approbation of

* This case was afterwards, by an order of the Lord Chancellor, dated the 1st of November, 1822, referred back to the K. B., with some additional facts, the principal of which were, that, at the date of the will, the plaintiff (in the will called "W. D.") and who was one of the persons whom the devisee was to marry, was a bachelor, A. L. had attained the age of fourteen, and Edward Miller Mundy (in the will named) had five sons respectively aged seven, six, four, three, and two years. That, at the date of the codicil, the plaintiff was a married man, and all the sons of E. M. Mundy were bachelors. That, at the time A. L. attained 21. and, at her marriage, plaintiff was a married man. On this amended case, the Court certified as follows:—"That the facts averred to be introduced into the said case are admissible in evidence in the said case; and, on the case so amended, we are of the opinion before certified; 2 Powell, by Jarman. 290

the trustees. Upon the death of the son, the daughters claimed the estate under the condition in the will.

Lord Mansfield. Conditions in restraint of marriage are odious, and are therefore held to the utmost rigour and strictness. Conditions precedent must previously exist. Therefore in these there can be no liberality, except in the construction of the clauses. But in cases of conditions subsequent, it has been established by precedents that where the estate is not given over, they shall be considered as only *in terrorem*. This shows how odious such conditions are, for in reason and argument the distinction between being or not being limited over, is very nice, and a clause can carry very little terror, which is adjudged to be of no effect. Though, to be sure, the reasoning will not hold. If the estate is given over, such a condition cannot be got over. The present case is doubly *in terrorem*, and made so by adding the clause that the said condition or proviso was not intended by him, nor to be construed nor taken to be *in terrorem*. In *Daly v. Clanrickarde*, 3 Ves. 531. the condition was, that he should marry with the consent of trustees, if not, the estate was given over.—The trustees were applied to; they offered to agree on a proper settlement being made. The marriage was had without their knowledge; but the settlement being afterwards made, their conditional consent was held to be sufficient. In *Bolton v. Humphries*, in Ch., the condition was, that if she married without the consent of N. H. in writing, then, &c. the estate was given over. She married without his consent; but he gave it as soon as he knew of the marriage. Lord Hardwicke held, this is a sufficient consent to entitle her to the real and personal estate, which was given her if she married with the consent and approbation of N. H., to be signified in writing. I mention these cases to show that the Court ought not to make strides in favour of a forfeiture. There can be but one true legal construction of these conditions, and therefore it must be the same in the Court of Chancery, and all other courts. The meaning of the testator, or the control which the law puts upon his meaning cannot vary, in what court soever the question chances to be determined. In the present case the forfeiture is so cruel as to begin with the innocent issue of the offender, who is to have it for his own life at all events. This testator considered money as the only qualification of a wife; but he still means to leave it to the judgment of trustees whether there might not be some equivalent for money.—He only meant to require their sanction in case his son married a woman with a competent fortune, or had the consent and approbation of his trustees to marry a woman without one. The blunder is in the penning only; the meaning is, that in either event it shall vest; the performance of either part of the alternative vests the estate. Here is no objection to the marriage: and one of the trustees is become one of the devisees over; therefore a cause of objection ought to be shown, otherwise it shall be considered as if his consent was withholden without reason, the consequence is, that judgment must be given for the defendant. The three other judges concurred in thinking it to have been the intention of the testator that his sons complying with either part of the alternative should be a performance of the condition; and that he did not incur a forfeiture, unless he had broken both parts of it; and that conditions in restraint of marriage, ought to be construed with the utmost rigour and strictness.

(c 1) *To receive no wages.*

MOLYNEUX v. SCOTT. T. T. 1730. K. B. 1 Bl. Rep. 376.

The devise of an annuity for life, and a direction that the annuitant shall receive no wages after the testator's death,

Justification in an action of trespass for taking cattle as a distress for the arrears of an annuity. The defendant was many years a menial servant to one A. B. who, in a codicil to his will, dated 20th May, 1775, devised the said annuity to him and his assigns for the term of his natural life, with a power of distress for non payment. And then, after several other bequests, he gives to the said defendant all his wearing apparel; and then adds, "And I do hereby direct that the said William Scott shall not have any wages for his service, for the time he shall serve my said son or my wife, after my death, by reason of the said annuity herein-before given him." The plaintiff replied that, after A. B.'s

death the defendant continued in the service of his wife and son for a short time only, and then departed of his own accord, without their consent. To which replication the defendant demurred, and plaintiff joined in demurrer.

Per Lord Mansfield, C. J. I had no doubt upon the first reading of this codicil, nor have any now. The intent of wills is certainly to be gathered from the whole taken together. No precise form of words is necessary; but vice.

the intent of the testator must be carried into execution, if found to be agreeable to law. This intent must be collected from what are called necessary implications, or, more properly, from such as are probable; the true construction of wills is the same, in a court of law and a court of equity. In all wills there is a tacit condition annexed, both in law and equity, that whoever would derive a benefit under a will, must acquiesce in the whole of it, however disjointed the parts. Having laid down these general rules, let us now consider the present case. If, from the words of the will or codicil, any intent should appear that the defendant should live on with the testator's wife or son, I should hold it to be clearly conditional; but no such intention appears. The codicil is drawn with legal assistance and advice, as plainly appears on the face of it. The annuity is a gift to his own old servant; not one who was about the person of his son, which might have been an inducement for the testator's desiring him to stay there. The gift is to him and his assigns, to enable him to sell it if he pleased; which it would be impossible to do, if it were defeasible whenever he absented himself. The words, "for the time he shall serve," prove to me that the servant had his option, and was not compellable to stay under pain of forfeiting his annuity. Besides 5*l.* per annum is not an equivalent for wages, board-wages, and clothes; all which might be withheld, under this direction of the codicil. On these circumstances of the case, and a full consideration of the whole of the codicil, I ground my opinion; and not on the want of any technical words, or formal arrangement of clauses.

(c) *As to the performance of conditions.*

THOMAS V. HOWELL. T. T. 1692. K. B. 1 Salk. 170. S. P. BADGER V. LLOYD. T. T. 1697. K. B. 1 Salk. 232; S. C. 1 Ld. Raym. 523; S. C. Com. 62. A. B. devised to his eldest daughter, on condition that she should marry his nephew on or before she attained the age of 21 years. The nephew died young; and after his death the devisee, being then under 21, married another. It was held that the condition was not broken, having become impossible by the act of God. It was not, indeed, expressly stated in this case that the Court held the condition to be subsequent; but, as it seems fairly to hear that construction, and the contrary conclusion would place the decision in contradiction to the doctrine under consideration, it may reasonably be inferred that such was the opinion of the Court, 2 Powell, by Jarman, p. 263.

8. *Estates joint or in common.*†

1. OATES V. JACKSON. M. T. 1731. K. B. 2 Stra. 1172; S. C. 7 Mod. 439. S. P. DOE, D. FREESTONE, V. PARRATT. T. T. 1794. K. B. 5 T. R. 652. S. P. BALDWIN V. KARVER. Cowp. 307.

This was a devise to A. for life; and, after her death, to B., and to the child. * It is far from clear, however, that this principle applies even to conditions subsequent, if the property be given over upon the non performance: 2 Atk. 16; 2 P. Wms. 626; 1 Eq. Ca. Abr. 112. pl. 10; 2 Powell, by Jarman, 263.

† It follows, as a consequence of the survivorship incident to joint tenancy, that if the said, the devise fail, as to one of the devisees, from being originally void (Dowset v. Sweet, Amb. 176.) or subsequently revoked (Humphrey v. Taveur, Amb. 136.) or from his death in comes ab the testator's life-time (Davis v. Kemp, Cart. 45; S. C. 1 Eq. Ca. Ab. 216. pl. 7; Carth. solute. 3.), the other, or others, will take the whole. But it is otherwise as to tenants in common, whose shares, in case of the failure or revocation of the devise to any of them, descend to the heir at law of the testator. (Cresswell v. Cheslyn, 2 Ed. 123; S. C. on appeal, 3 B. P. C. Toml. Ed. 216.), unless the devise be to them as a class, in which case the individuals composing the class, at the death of the testator, are entitled to the entirety of the subject between them; 2 Powell, by Jarman, p. 373.

As to the performance of conditions, that when it is precedent the devise fails although there be no laches on the part of the devisee himself; Page v. Hayward, 1 Salk. 570; Driver, d. Edgar, v. Edgar, Cowp. 379; but if a condition subsequent be rendered impossible to be performed, it has been

1. OATES V. JACKSON. M. T. 1731. K. B. 2 Stra. 1172; S. C. 7 Mod. 439. S. P. DOE, D. FREESTONE, V. PARRATT. T. T. 1794. K. B. 5 T. R. 652. S. P. BALDWIN V. KARVER. Cowp. 307.

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[329] dren of her body, begotten or to be begotten by C., her husband, and their heirs for ever. One child was born at the time of the testator's decease. The Court held that a joint tenancy was created between B. and her children.

See Cart. 4; 1 Eq. Ca. Abr. 207. pl. 7; Cro. Eliz 431; 3 Leon. 11; 1 And. 188; 2 Ridgw. 85; 3 P. Wms. 115; 1 Vern. 482; 1 B. C. C. 181.

2. ROSE D. VERE, v. HILL. E. T. 1766. K. B. 3 Burr. 1881.

A person devised lands to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants. It was contended that this was a tenancy in common among the five children for life; with a survivorship to the longer of them. Lord Mansfield said, that an estate to more than one, with a benefit of survivorship, was a joint tenancy; but here the testator had expressly declared that they should not take as joint tenants. The construction contended for was too refined for the testator's meaning. He meant to dispose of his real estate among his children, after the death of his wife. He used the same words in disposing of the real estate, as he did in disposing of the personal, and they explained each other. There were words in the will which plainly showed that he meant his estate to go to the representatives of his children, after their deaths, though he had used improper terms. It was plain that they were not to take as joint tenants; and, it was plain to him, that he considered that several of his five children might happen to die in his own lifetime, and therefore made a provision for such of them as should survive him, and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse; and, therefore, the Court might rather apply the words to a fixed particular time, than to give no meaning at all to them; and this was agreeable to the case of *Stringer v. Philips*, 1 Eq. Ca. Ab. 292.

3. BLISSET V. CRANWELL. E. T. 1694. K. B. Comb. 256; S. C. 1 Salk. 226; S. C. 3 Lev. 373. S. P. S. P. Doe, d. Long, v. Laming, 2 Burr. 1100. S. P. Pibus v. Mitford. T. T. 1674. K. B. 1 Vent. 376. S. P. Philips v. Philips. H. T. 1701. K. B. 1 Ld. Raym. 721; S. C. 1 P. Wms. 34. S. P. Scrape v. Rhodes. E. T. 1737. 2 Com. 542. S. P. Tuckerman v. Jefferies. H. T. 1706. K. B. 11 Mod. 108. S. P. Loveacres, d. Mudge, v. Blight. Cowp. 352. S. P. Barker v. Giles. 9 Mod. 159. S. P. Denn v. Gaskin. Cowp. 657. S. P. Garland v. Thomas. 1 N. R. 82. S. P. Fisher v. Wigg. 1 P. Wms. 14; 1 Ld Raym. 12 Mod. 296. S. P. Hawes v. Hawes. 1 Wils. 165. S. P. Doe, d. Liverstage, v. Vaughan. K. B. 1 D. & R. 52. S. C. 5 B. & A. 464. S. P. Clayton d. Lowe. 5 B. & A. 636. S. P. Bateman v. Roach. 9 Mod. 104. S. P. Anon. Skin. 182. S. P. Duffa v. Mayo. 1 Saund. 283; S. C. 5 Mod. 214; S. C. 2 Keb. 576.

[330]

But any words which do note an equality or division, such as "equally to be divided."

A. B. devised lands to his two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs. after the death of his wife. The Court was of opinion that the sons were tenants in common, and that the devise was good; and the reason was, upon the construction of wills, that it ought to be according to the intent of the devisor; his intent appearing to be, not only to provide for his two sons, but for their posterity; that not only his two sons, but their heirs, should have an equal part; for the words were, "equally to be divided between them and their heirs." And though by the first words it was given to them, and to the survivor of them, yet the last words explained what he intended by the word "survivor," that the survivor should have an equal division with the heirs of him who should die first.

Where a tenancy in common is created, the interest or share of each must appear on the face of the instrument by which it is created; 4 Dow. 199.

* But a devise to husband and wife gives the estate by entireties and not by moieties; 5 T. R. 652. So an exception to the rule that a devise to several persons creates a joint-tenancy, exists in regard to estates tail. In such case the devisees are joint tenants for life, with several inheritances in tail: so that, on the death of one of the devisees, whether he leave issue or not, the survivor becomes entitled to his share for life, under the joint-tenancy; *Wilkinson v. Spearman*, cited 2 Vern. 545; 2 P. Wms. 529; Co. Litt. 182. a.; 2 Powell, by Jarman, p. 369.

And though the testator had not aptly expressed himself, yet, upon all the words taken together, his meaning seemed to be so.

4. *HANCHET v. THELWAL.* E. T. 1686. K. B. 3 Mod. 104.

A testator, having two sons and four daughters, devises his houses to one of his sons for life; and, after his decease, "then I give my estate to my four daughters, share and share alike; and, if any of them die before marriage, then her part to the rest surviving; and, if all my sons and daughters die without issue, then I give my said houses to my sister and her heirs." On the death of the son without issue, the Court held that the four daughters were tenants in common; and, therefore, if one married and died, leaving issue a son, such son should come in for his fourth part of the estate.

6th. *Limitation to survivors.*†

[331]

1. *SMITH v. HORLOCK.* M. T. 1816. C. P. 7 Taunt. 129.

A testator devised that his executrix should borrow as much as was necessary to satisfy all demands, and repay it out of the money arising from rents during the minority of the testator's two children, Ann and George. He bequeathed his property both real and personal, to be divided equally between his two children, allowing that his son George should take, as a part of his share, the testator's farm, at B., excepting the house and land which he bought of his father's trustees, at B., together with the furniture thereof he left to them in common, and to the longest liver in fee-simple, and that his children should be put into their respective shares of the rent received during their minority,

In limitations to survivors, the question frequently arises, viz. to what period the survivorship is referable. It was at

* So a devise in trust to be distributed among persons, "in joint and equal proportions;" length re Ambli. 656; "equally amongst them;" 1 Eq. Ca. Abr. 292. pl. 104; Cro. Eliz. 433; referred to Cowp. 65; "equally respectively;" Sty. 434; 9 Ves. 456; with a limitation to their heirs, the death "as they shall severally die;" 2 Atk. 441; as to several "between them;" 2 Meriv. 70; of the testator to several, their heirs, &c. "all to have part alike, and every of them to have as much, in case as the other;" Cro. Car. 75; or to several to be enjoyed "alike;" Cowp. 352; *et vide* 1 see where Vern. 353; S. C. 1 Eq. Ca. Abr. 292. pl. 7; 3 B. C. C. 25; has created a tenancy in the limitation common. So a devise of real estate to A. B. and C., and their heirs, to be sold, and the money to be equally divided amongst them, is a devise in joint tenancy of the land, and in mediate; tenancy in common of the produce of the land when sold; therefore the heir at law of A. cannot maintain ejectment for the land without giving direct evidence of the death of B. & C.; Goodtitle, d. Roebuck, v. Oxley, 7 D. & R. 535. Devise of the residue of the residue of the testator's real and personal estate and effects to trustees, to pay the rents, produce, and profits to testator's wife for life; and, after her decease, to his daughter for life; and after the decease of his wife and daughter, he devised the said residuary trust estates to all and every the issue, child or children, of his daughter as should be living at the time of the decease of the survivor of his wife and daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain the age of 24 years, and to their respective heirs, executors, &c. for ever, to take as tenants in common, and not as joint tenants. Held that the daughter's children (seven in number) took equitable estates in fee, as tenants in common in the real estates of the testator, by virtue of the residuary clause; but that they would have taken legal estates in fee, as tenants in common, by virtue of such residuary clause, if it had been made without the introduction of trustees; Farmer v. Francis; 9 Moore, 310; S. C. 2 Bing. 251.

And, in fact, any words or expressions will suffice which show that the devisees are referred to, as owners of respective or distinct interests. Thus: a bequest to two, with direction that one of them shall be maintained and educated, during his minority, out of a fund; and that, if he should wish to be put out apprentice, a competent sum should be raised out of the fund for the purpose and in part of his share, was held to create a tenancy in common; Gant v. Laurence; Wightw. 395.; so, even where a testator devised the residue to his daughters as tenants in common, and afterwards by a codicil again devised it to them, but omitting the words of severance; held, nevertheless, that they took as tenants in common; Mathews v. Bowman; 3 Anst. 727.

† Where property is given to a plurality of persons, with a devise or bequest over in certain events of the shares of dying objects to the survivors, the word "survivors," is construed others (Pettitwood v. Cooke; Cro. Eliz. 52; Woodward v. Glassbrook; 2 Vern. 383; Harman v. Dickenson; 1 B. C. C. 91; Chadeck v. Cowley; Cro. Jac. 695.); so that as well those who die before, as those who survive the objects in question, are entitled, provided, of course, that their deaths did not happen under circumstances which subjected their shares to the operation of the limitation over. It has long been an established rule, that provisions disposing of the shares of devisees and legatees, dying before a given period, do not *proprio vigore* extend to shares accruing under that disposition; 3 Atk. 80.; but questions sometimes arise as to the effect of particular expressions to carry the accruing as well as the original shares; 2 Vern. 388; 3 Atk. 78; 1 Bro. C. C. 575.

as well as their shares of landed property, when they should attain their respective ages of 21 years. Ann died living the testator. Held, that the son George took all the testator's property, both real and personal, and all his estate and interest therein. See 1 P. Wms. 96; 1 Wils. 165; 2 Ves. jun. 264; 4 Ves. 553.

2. *ROSE, D. VERE v. HILL*. E. T. 1766. K. B. 3 Burr. 1881.

And at one time, even where the limitation was not immediate.* The testator devised his lands to his wife for life; and after her decease, to his five children (naming them), and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants.

Lord Mansfield and the other judges of the Court of King's Bench held that these words were inserted to carry it to the survivors, in case of the death of any of the devisees in the testator's life-time, and that they took as tenants in common. See 1 Eq. Ca. Abr. 292; 3 Bro. Ch. C. Tomlins's edit. 195; 2 Ves. jun. 265, 631; 17 Ves. 171; 4 Madd. 15; 5 Ves. 234, 450; 4 id. 551; 19 Ves. 537; 6 id. 297; 7 id. 279; 13 id. 375.

3. *GARLAND v. THOMAS*. T. T. 1831. C. P. 1 N. R. 22.

A. B. devised his estate to trustees and their heirs, to the use of the testator's nieces, S. C., E. G., and A. C., and the survivor and survivors of them, and the heirs of the body of such survivor and survivors of them, as tenants in common, and not as joint-tenants; and, for want of such issue remainder over.

The Court, on the authority of 1 P. Wms. 96; 1 Eq. Ca. Abr. 292; 3 Burr. 1881. certified to the Master of the Rolls that the limitation to the survivors was intended to provide for the event of the death of any of the devisees in the testator's life-time, and that all surviving the testator took as tenants in common.

4. *DOE, D. LIFFORD v. SPARROW*. H. T. 1811. K. B. 13 East, 359.

A. B. devised the residue of his real and personal estate subject to the payment of debts and legacies to the testator's son and daughter, *their heirs and assigns forever, as tenants in common, and not as joint tenants*; but in case of the death of either, leaving child or children, the share of him or her so dying was to go to his or her child or children; or, if all such should die before 21, such share was to go to the survivor of the son or daughter for ever; but in case his son and daughter should be both dead *at the time of the testator's decease*, without child or children, or leaving child or children, all of them should die under 21, and unmarried, and without child or children, then he gave the whole of his real and personal estate to his executors, upon certain trusts, for other branches of his family; and then the will proceeded, as to the rest and residue of his estate, and afterwards, *in case of the death of his son and daughter, and without child or children, and other the events aforesaid*, then he gave the same to his brother in fee. The question made was, whether the limitation over upon the testator's son or daughter dying without child or children was to be confined to his or her so dying *in the life-time of the testator*. It was urged, that the devise to the son and daughter was either a devise to them in fee, defeasible as to the moiety of each by either dying, without child or children, in the life-time of the other; in which event it would go over to that other; but if either left issue, such issue would take a fee in the parent's moiety, defeasible also in the event of such issue dying before 21. Or when the testator gave the estate to his son and daughter in fee, as tenants in common, but in a particular event he also gave it to the children, if any; that might be taken to control the former words, or make the son and daughter take for life, with a contingent remainder in fee to their children, if any; if none, with a contingent

* This rule was adopted on the ground that *indefinite survivorship* was inconsistent with an *estate in common*, in which case, only the question above agitated could arise; as where the parties are joint tenants, the limitation to the survivors would probably be considered as more expressive of the *jus accrescendi*, which is similar to a joint tenancy, and consequently as extending to survivorship at any period. Mr. Jarman. (2 Powell, 780 & 782.) however shows that the distinction is untenable, on the ground that although survivorship is not incident to a tenancy in common, yet no inconsistency exists between a tenancy in common, and an *express* limitation to survivors.

remainder to the survivor. Or, it might be taken to be an estate tail in the son and daughter, in case either should die in the life-time of the other, without leaving children who should come to an age to dispose of the property; but if either should have such children, then to take a fee.

Sed per Cur. The limitation to the children of the deceased's son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of the testator's son or daughter in his life-time; so that if both son and daughter survived him, he intended them to take the fee as tenants in common; if one died in his life-time, and left issue, such issue was to take the parent's share; or, if there should be no such issue, which should attain 21, the survivor of the son and daughter should take the whole; or, if both died in his life-time, and either left issue, such issue was to take; but if both died without issue in his life-time, then the executors were to take on the trusts mentioned; remainder to his brother in fee.* See 1 Bro. Ch. Rep. 489; 2 Ves. jun. 501. 506; 4 T. R. 294; 6 id. 34; 1 B. & P. 215; 1 And 43; 6 Rep. 16; 2 Lev. 58; 8 T. R. 211; 7 T. R. 531; 1 East, 229; 4 T. R. 82; Precedents in Ch. 78; 2 Str. 1261; 4 Ves. jun. 160; 8 id. 410; 1 N. R. 82.

5. *EDWARDS v. SYMONS.* M. T. 18 5. 6 Taunt. 213; S. C. 2 Marsh. 24.

C. bequeathed one shilling to his eldest son and heir at law, and then devised his estate to trustees, for the maintenance of his six younger children; and, immediately on the youngest attaining the age of 21, then to his said six children, and the survivor and survivors of them, their heirs and assigns for ever, as tenants in common. The Court held, that the term survivor and survivors was to be referred to the testator's death, and not to the coming of age of the youngest child; and, therefore, that B. having died without issue, and intestate, after the testator's death, and before the coming of age of the youngest child, had, at the time of his death, a fee simple estate, in reversion, in one-sixth part, as tenant in common with his surviving brothers and sisters, which, on his death, descended to his heir at law. See 3 Co. 19; 1 Burr. 228; 1 Bl. 519; 3 T. R. 41; 3 Burr. 1881; 3 Lev. 373; 3 Atk. 524; 7 Ves. jun. 279; 4 Ves. jun. 551; 1 N. R. 23. 82.

6. *DOE, D. BORWELL v. ABEY.* E. T. 1813. K. B. 1 M. & S. 428.

This was a devise to the three sisters of the testator, for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common, and not as joint tenants; remainder to trustees during the respective lives of the sisters, and the life of the survivor, to preserve contingent remainders; and from and after their respective deceases, and the decease of the survivor, remainders over. The Court held, that the words "as tenants in common" might be taken as descriptive rather of the mode of enjoyment, than of the interest, since the remainder over was to take effect only on the death of the survivor, which construction would make them joint tenants; or if they were to be taken as descriptive of the interest, then, by virtue of the limitation over, they took as tenants in common, with benefit of survivorship. See 2 Roll. Abr. 90. pl. 5, 1 Wils. 166; 3 Lev. 373; S. C. Salk. 226; 3 Burr. 1886.

* But, in *Roe, d. Sheers, v. Jeffrey* (7 T. R. 560), it seems to have been taken for granted, that an executory limitation for life to certain persons, or the survivors, was not confined to the survivors at the happening of the contingency; but, as the devise had not, at the death of the object, fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period; 2 Powell by Jarman, p. 752.

† Upon the above case, Mr. Jarman (2 Powell, p. 754.) remarks: it is evident that, by "benefit of survivorship," the Court meant, a gift to the survivor; and their observation goes to this: that though survivorship is not an incident to a tenancy in common, yet a limitation to the survivor is by no means inconsistent with it. There is much good sense in the reasoning of the Court in this case. It is extraordinary that the consistency of an express limitation to survivors indefinitely, with a tenancy in common, should be reserved for discovery at this late period. If it had been made a century earlier, a most prolific source of litigation would have been prevented.

To the inadequacy of the ground, on which the rule adopted in the earlier cases had been founded, the same author attributes, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping and, as he observes, groundless exceptions engrafted upon it, which, at length, rendered it uncertain whether such a rule of construction any longer existed.

the survivor, to the death of the testator, in referring such to be the testator's intention, from the entire property being given over in case both the devisees were dead at the time of the testator's decease.

So where A. bequeathed 1s. to his heir at law, and then devised his estate to trustees to maintain his younger children; and immediately on the youngest attaining 21, to those

[334] children and the survivor and survivors of them, &c. as tenants in common. But where a limitation was made to several, as tenants in common for life, and to the survivor, with a limitation over, it was construed as a reference to survivorship indefinitely; *et vide note*, †

[335] 7thly. *As to what words, will make the property devised, liable to debts and legacies.**

1. *Considered as to the mode of direction.*

(a) *With reference to the fund.*

(a 1) *Where no fund is specified.†*

The cases on the subject, many of which arose on bequests, may be consulted at length by those who are desirous of unravelling for themselves the mystery in which, by reiterated discussion, it has become involved. They are to be found in 2 Ves. jun. 634. where survivorship was held to relate to the period of distribution, and not to the death of the testator, on the ground that the subject of gift (being the produce of land devised to be sold) was not *in esse* until this period; 19 Ves. 574. and one Jac. & W. 146. where the same period was fixed upon by the Court; in 6 Ves. 297. where it was held to refer to the period of distribution, on the ground that another subject given to the same objects was expressly so limited; in 8 Madd. 410. and in 4 Madd. 17. the facts of which latter case, as containing some strong remarks on the rule in question, may be here appositely stated. The testatrix gave and appointed her real and personal estate in trust for her husband for life; and, after his decease, directed that her personal estate should be equally divided between her two sons, A. and B., and C., her daughter, and the survivors or survivor of them, share and share alike. A. died in the life time of the husband; B. and C., as the survivors at his death, claimed the whole; and Sir J. Leach said: "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator; and the survivors at his death will take the whole legacy. This was the case of *Stringer v. Phillips*; 1 Eq. Ca. Abr. 29. But, if a previous life estate be given, then the period of division is the death of the tenant for life; and the survivors, at such death, will take the whole of the legacy. This is the principle of the cited cases of *Russell v. Long*, 4 Ves. 55; *Daniell v. Daniell*, 6 Ves. 297; and *Jenour v. Jenour*, 10 Ves. 562. In *Hindon v. Lord Suffolk*, 1 P. Wms. 96; the House of Lords found a special intent in the will, that the period of division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. The two cases of *Roeback v. Dean* (1 Ves. jun. 267.), and *Perry v. Woods* (3 Ves. 204.), before Lord Rosslyn (*Perry v. Woods* was decided by Lord Anvanley), do not square with the other authorities. Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous estate for life.

* By the common law, real estates are not subject to the payment of debts due on simple contract, unless made so by will; which is considered by many as a great defect, because credit is in fact given to the possessors of landed estates in proportion to the value of them. He, therefore, who neglects to charge his real property with the payment of his debts, sins, as it has been emphatically said, in his grave. And, if he omits this circumstance, on purpose to defeat the demands of his creditors, he dies with a deliberate fraud in his heart. These principles have given rise to a rule, both at law and in equity, that, whenever a testator expresses an intention that all his debts shall be paid, or devises all his property subject to the payment of his debts, his real estate shall be charged with the payment of his debts be simple contract, if there be a deficiency in his personal estate; 6 Cru. Dig. 393. Here it may be observed, that, in construing provisions for payment of debts, the Courts are adverse to a construction which would confine them to debts subsisting at a given period in the life of the testator; 1 Eq. Ca. Abr. 201. pl. 12; 8 Vin. Abr. 328. pl. 2; 1 Madd. 433. It has sometimes been made a question, whether the same words which will charge a real estate with debts, are adequate to charge it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite; 2 Ves. jun. 328; 3 Ves. 551; 5 id. 361; 2 P. Wms. 187. The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone, in holding debts to be charged by general and equivocal expressions, the unfairness of which, when applied to legacies, became apparent; 3 Ves. 789. Instances may certainly be adduced from the later cases, in which legacies have been held to be charged upon land, by expressions of a character scarcely more decisive than those which have this operation in regard to debts; 2 Dick. 526; 2 Atk. 368; 4 Madd. 187.

† Whether a general direction by a testator, that his debts shall be paid, charges the real estate with the payment, is a question which has been much agitated. In an anonymous case, in *Freem. Ch. C.* 192. the lands were, under such circumstances, held not to be charged; et vide 1 Vern. 457; S. C. 1 Eq. Ca. Abr. 198. pl. 3. the facts of which case are as follow: A testator expressed himself thus: "I will all my debts shall be paid before any of my legacies or gifts hereinafter mentioned;" and then gave several pecuniary legacies; and afterwards, in the same will, devised certain lands to several persons charged with rents. The Court held that these lands were not subjected to the payment of the debts; for the general clause at the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereout devised. But a long train of decisions has, at length, estab-

- (b 1) *Where a fund is specified.**
 (6) *With reference to the parties to whom the direction is made.*

[336]

- (a 1) *Where to executors generally.†*
 (b 1) *Where to executors being devisees.‡*

V. RELATIVE TO REGISTERING DEVISES.§

[337]

lished, that a direction for the payment of debts generally, operates the realty; see 1 Vern. 45; S. C. 1 Eq. Ca. Abr. 197. pl. 1; Prec. Ch. 264. 430; 1 Vern. 704; S. C. 1 Eq. Ca. Abr. 196. pl. 6; 2 Vern. 690; S. C. Eq. Ca. Abr. 193. pl. 5; 3 P. Wms. 91; Ca. Temp. Talb. 110; 2 Vern. 709; 1 Bro. P. C. 571; 2 Ves. sen. 271; 3 Ves. 542. 739; 3 Bro. P. C. 157; 2 Ves. jun. 328; 5 Ves. 545; 6 Madd. 31.

* This case forms an exception to the rule which, it has been pointed out in the preceding note, had been established, as governing the construction of devises, charging in general terms, the realty with the payment of debts and legacies. In *Thomas v. Britnell* (2 Ves. 313.) A. B., reciting that he had made a former will, in the life of his wife, in which he had given her all his real and personal estate; that he had the misfortune to lose her, and therefore he made his will for the disposition of the same. First, he ordered all his debts and funeral charges to be honorably paid after his decease. In a subsequent clause, he devised particular premises, enumerating them, excepting H. and R.; all which enumerated lands, except H. and R., he devised to trustees, by, and out of, the money arising by sale, and out of the rents and profits thereof, in the mean time, in the first place, to pay and discharge all his debts, funeral expenses, and all legacies given by his will, or by other writing under his hand. He afterwards went on and said, that H. and R. should be in the first place for payment of the legacies mentioned in his will. A bill was filed by the creditors, to have the real estate by the will, subjected to the payment of their debts, in aid of the personal, so far as that proved deficient, insisting that the whole real estate was, by the will, established as a fund for payment of debts. And, whether the whole, or any part, of the real estate was subject to debts, was the question. Sir J. Strange, M. R., said, the word "same" must relate to the real and personal estate before given: and if it stood on that, and the word "first," only, he should have no doubt but that his whole real estate would be subject to the payment of debts; not from any express mention made, that they should be a charge on his real estate, but from that construction the Court makes for the benefit of creditors; and that men should not sin in their graves. Here was no express declaration on the outset of the will, that the testator's whole real estate should be charged with payment of his debts; therefore, it was necessary to look further into his will, and to see what was the intent of the testator, who was not bound in fact, though bound in honour, to make such a disposition for his creditors. Considering the whole, he had subjected the greatest, but not every part of his real estate to the payment of his debts; having excepted a particular part, and applied it to another purpose; not intending that H. and R. should be liable to be swallowed up by creditors, to the prevention of the legatees under the will; but afterwards directed what should be done with H. and R. He had personal estates, which he could not exempt from payment of his debts; he had real, the whole of which he might subject; in declaring his intent as to that, he exempted H. and R. entirely, reserving them as a fund for legatees only. On the clauses, therefore, altogether, and which were only clauses by which he expressly charged his land therewith, he considered how far his real estate should be chargeable to creditors; and then thought himself at liberty to apply the other part to satisfy legatees. Therefore, though on the first, the Court might take the whole real to be charged with debts; yet, as there was no express lien on the real, by those general words, and afterwards he distributed such part of his real for debts, and such for legacies; it was too much to lay hold on the general words, to say the whole should be charged with payment of debts. It could only be done by implication on the general words, which might be explained afterwards, and the implication destroyed; consequently, the plaintiffs could only have a decree for an account of the personal estate, and then the other parts of the real estate, except H. and R. for payment of their debts. But, unless the intention to exempt a particular part of the real estate be very clear, the whole will be subject; 2 Ves. 568, 3 id. 155.

† Where the debts are directed to be paid by the executors, unless land be devised to them, it will be presumed that the payment is to be made exclusively out of funds which, by law, devolve upon them in that character; see 3 Ves. 550; 5 id. 359; 7 id. 219; *Willan v. Lancaster*, MSS. 2 Powell, by Jarman, p. 657.

‡ Where the executor is devisee of the real estate, a direction to him (though describing him as such) to pay debts or legacies, will, it seems, cast them on the realty; see 2 Eq. Ca. Abr. 497. pl. 16; Vin. Abr. Charge D. pl. 15; 2 Vern. 228; S. C. 1 Eq. Ca. Abr. 198; pl. 4; 2 Bl. Rep. 1041; 1 Vern. 411; S. C. 1 Eq. Ca. Abr. 197. pl. 2; 3 Meriv. 310; *Ronalds v. Faltham*, 1 Turner and Russel, p. 418. This principle does not, however, apply, when one of the executors is devisee for life only; 1 Ves. jun. 436; S. C. Dom. Proc. 7 Bro. P. C. 573.

§ By the stat. 2 & 3 Ann. c. 4. s. 20. it is enacted, that all memorials of wills that shall be registered, of any lands in the West Riding of the county of York; within the space of six months after the death of every respective deviser dying in England or Wales, or within the space of three years after the death of every deviser dying abroad, shall be as valid

VI. RELATIVE TO THE EFFECT OF A DEVISE.

(A) IN BARRING DOWER.

LAWRENCE V. DODWELL. H. T. 1697. K. B. 1 Ld. Raym. 438; S. C. Lutw. 735.

A general provision [338] made by a husband for his wife, will not be sufficient to raise a cause of action, unless he has expressly declared such provision to be in lieu of dower, or must necessarily be presumed to have so intended.

A. B. devised lands of the annual value of 130*l.* to his wife, during her widowhood. After the determination of that estate, he devised the same premises, together with all his other lands, to trustees, for a term of 24 years, in trust for the payment of his debts and legacies. As a further provision for his wife, he directed that after two years of the term were expired, his trustees should permit her to receive the rents and profits of another farm of 90*l.* per annum, for the remainder of the said term of 24 years, so long as she should continue a widow. She entered upon the lands devised to her, and afterwards brought a writ of dower; to which was pleaded the devise, with an averment that the same was in satisfaction of her dower. Upon demurrer to this plea, judgment was given for the demandant.

and effectual against subsequent purchasers, as if the same had been registered immediately after the death of such devisor. By the next section it is provided that, in case the devisees, by reason of the contesting of such will, shall be disabled to exhibit a memorial for the registry thereof, within the times before limited, then, and in such case, the registry of the memorial within the space of six months next after the attainment of the will, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act. By the stat. 6 Ann. c. 35. s. 14., the same provision is made for registering wills of lands in the East Riding of Yorkshire, as in the above act; and by the next section it is provided, that, in case the devisee, by reason of the contesting such will, or other inevitable difficulty, without his wilful neglect or default, shall be disabled to exhibit a memorial for the registry thereof within the times limited, and that a memorial shall be entered in the office of such contest or other impediment, within six months after the decease of the devisor, who shall die within the kingdom of Great Britain, or within three years after the decease of such person who shall die beyond sea, then, and in such case, the registry of the memorial of such will, within six months after the attainment of such will, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act. By the stat. 7 Ann. c. 20. s. 8., the same provision is made for registering wills of lands in the county of Middlesex, as in the stat. 2 & 3 Ann.; and it is provided (s. 9.) that, if the devisee, by reason of the concealment, or suppression, or contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial for the registry thereof within the times limited, and that a memorial shall be entered in the office of such contest, or other impediment, within two years after the death of such devisor, dying in Great Britain, or four years after the death of such person, dying beyond sea; then and in such case the registry of the memorial of such will within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act; provided, that in case of any concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within five years after the death of the devisor. By the statute, 8 Geo. 2. c. 6. s. 15. the same provision is made for registering wills of lands in the North Riding of Yorkshire, as in the statute 2 & 3 Ann; and it is provided (s. 16.), that in case the devisee, by reason of the contesting such will, or other inevitable difficulty, shall be disabled to exhibit a memorial within the times limited, and that a memorial shall be entered in the office of such contest or impediment, within six months after the decease of such devisor, dying in Great Britain, or three years after the death of such person, dying beyond sea, then, and in such case, the registry of the memorial of such will, within six months after its attainment, or a probate thereof, or removal of the impediment, shall be a sufficient registry within the meaning of the act; and it is provided, by the next section, that in case of any concealment or suppression of any will or devise, no purchaser or purchasers for valuable consideration shall be defeated or disturbed in his or their purchase, nor any judgment or statute creditor shall be defeated of their debts, by any title made or devised by such will, unless the will be actually registered within three years after the death of the devisor.

* In 1699, Lord Chancellor Scamers, on a bill brought by the first remainder-man, decreed a perpetual injunction against the widow to stay further proceedings upon the judgment obtained by her. This decree was reversed by Lord Keeper Wright, in 1702, and the widow continued in the enjoyment as well of the lands devised to her, as those assigned for her dower. In 1712, a bill was brought by a subsequent remainder-man to be relieved against the judgment obtained in dower; whereupon Lord Chancellor Cowper, in 1715, declared that as to the dower, it being a point of right, and so doubtful in its nature, that the Court had been of different opinions therein, and the determination in 1702 having remained ever since unquestioned, he did not think fit to make any variation from what was then determined as to that point. Finally, Lord Cowper's decree was carried before the House of Lords, in 1717, when the same was affirmed; and see Lord Raym. 458; Lutw. 754; 3 Vern. 363;

(B) IN BARRING A JOINTURE.*

(C) IN BARRING AN ESCHEAT.†

1 Eq. Ca. Abr. 218; 2 ib. 253, 254; 1 Freem. 221; 8 Vin. Abr. 561; 9 Vin. Abr. 248; Co. Litt. 26, b. n. (1) 17th ed.

Where a testator devised certain lands to his wife, without mentioning the same to be in satisfaction of her dower; and devised the residue to his executors until his debts were paid; the Lord Keeper decreed the devise to be no recompense in bar of dower, but a voluntary gift (*Hutchin v. Hutchin*; 8 Vin. Abr. 361. *Proc. Ch.* 133.) And where a testator devised lands to his wife for life; and others to the plaintiff in fee; and the lands devised to the wife were of greater value than her dower, but were not expressed to be in satisfaction thereof, and she brought dower against the plaintiff, and recovered, against which judgment he brought his bill to be relieved; Lord Chancellor Parker said, the point had been already determined by the House of Lords, and that there was no relief in equity in such case, and dismissed the bill. (*Lemon v. Lemon*; 1 Eq. Ca. Abr. 253; 8 Vin. Abr. tit. Devise, 366. In *Estcourt v. Estcourt*, 1 Cox Ch. Ca. 2., the Master of the Rolls observed that *Lawrence v. Lawrence*, and *Lemon v. Lemon*, were founded on a misapplication of the general rule, which was, that a collateral satisfaction of the wife's freehold must be expressed or necessarily implied.) And also where a husband gave a bond in the penalty of 1,000l. for securing 500l. to his wife in case she survived; the same was held to be no bar to her dower; and though parol evidence was tendered of her acknowledgment that it should be so, yet the same was not permitted to be read, being within the statute of frauds (29 Car. 2. c. 3.) and perjuries (*Tinney v. Tinney*, 3 Aik. 8.) But if it be said in the will that the devise is made in lieu and satisfaction of dower, or on condition that the wife shall not claim dower; then the wife cannot have both, for that would be repugnant to the intention of the testator. The wife must therefore, in such a case, make her election; 4 Rep. 4. n; *Dyer*, 220; *Cro. Eliz.* 123. And notwithstanding the doctrine established in the case of *Lawrence v. Lawrence*, and the frequent recognition of it; devises have been sometimes deemed a satisfaction in equity for dower, on account of strong and special circumstances. As where allowing a widow to take a double provision, would be quite inconsistent with the disposition of the will: 1 Bro. R. 292. There are, however, several modern cases, where a devise of an annuity to a wife, either entirely or partly charged on the estates on which she is dowable, together with the gift of those estates to another, or a devise of them to trustees, has been held not to be a satisfaction of dower, but the widow has been allowed to have both; 3 Bro. R. 347; 2 Ves. jun. 573; 2 Ves. 219; 6 Ves. 615.

* The principles laid down in the preceding note as to the effect of devises in barring dower, have been adopted with respect to jointures, so that a general devise of other lands, or of personal property, by a husband to his wife, will not operate as a bar to jointure settled on his wife, either before or after marriage; 4 Bro. P. C. 593; 2 Atk. Wms. 613; 1 Atk. 446; 2 Ves. 509; 7 Bro. P. C. 461. But where a freehold estate is devised to a woman expressly for her jointure, and in bar and satisfaction of a jointure settled on her, either before or after marriage; in such case the widow cannot have both, for that would contradict the will; but she must make her election; 2 Abr. Eq. 392. Although a devise be not expressly mentioned to be in bar of a jointure, yet if it should appear, from any circumstance in the will, to have been the intention of the testator that such devise was meant as a satisfaction for the jointure, a Court of equity would, it is presumed, reason by analogy from the cases in which a devise has been held a satisfaction for dower, and compel the jointress to make her election; 1 Cru. Dig. 234. There is one case where there is a deficiency in a jointure, and the husband having devised lands to the jointress for her life, and also a sum of money, such devise and bequest were held to be a satisfaction for the deficiency of the jointure; 4 Bro. P. C. 598.

† A devise, though it only takes effect at the moment of the testator's death, will prevent an escheat. And in a note of Lord Nottingham's to the first institute. (1 Inst. 236. n.), it is said, that where a woman, seised of lands in London, devised them to be sold by her executors, and died without an heir, the devise prevented the escheat, which the King pretended to have; and the executors might enter and sell; therefore, more than a bare authority passed; yet, in 1651, on evidence at the bar, this case being stated, Lord C. J. Rolle doubted of the opinion, because he said it was only a descent, according to the words of Littleton; and it appeared to him, that when lands were devised to be sold by executors, there no interest passed; 1 Roll. Rep. 214. A man devised his estate to his wife for life; and that, after her death, it should be sold by A., and the money to be divided amongst the plaintiffs. The testator died without heir; before any sale A. died also. It not appearing that the land was held of any mesne lord, the plaintiffs brought their bill against the Attorney-General, praying to have their will established, and to hold and enjoy against the crown or to have the land sold pursuant to the will. Lord Hardwicke said, if he could relieve the plaintiffs he would. That he thought at first this was a bill brought to prove a will, by which the lands themselves were devised to somebody; if so, he would have thought such a bill proper; would have declared the will to be well proved; and decreed the devisee to sell, without any occasion of making a decree against the crown. But here was no devise of the land, only a power to sell. If A. had lived, as he had only a power, and no interest in himself, none could arise from him, but from the testator; and he, as well as the testator,

[340]

(D) IN SEVERING JOINT TENANCIES.*

(E) ITS EFFECT ON CONTINGENT USES.†

(F) ON THE RIGHTS OF CREDITORS.‡

(G) AS CONNECTED WITH THE DOCTRINE OF MERGER.

COODTITLE; D. VINCENT, v. WHITE. H. T. 1812. K. B. 15 East, 173.

Where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not contemporaneous.

A testator devised all his estate to his wife, in case his daughter (who was his heir) died under the age of 21 years. The mother died intestate; so that the daughter, upon whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her mother, to the executory interest so limited. The daughter died under 21; upon which her heirs, *ex parte materna*, claimed the property under the executory limitation, which was resisted by the heirs, *ex parte paterna*, on the ground that the executory fee had been extinguished by the union of the several interests in the person of the daughter. On one side it was contended that upon principle when two fees unite in the same person, the first of which is determinable, and the second to commence when the first ends, they necessarily coalesce, and form one entire fee simple; and cannot by law continue distinct. On the other hand it was urged that they might continue distinct, and that there were authorities in point to that effect.

Per Cur. This is not the case of a limited fee and a reversionary fee co-existing in the same person, as would be the case if a fee simple conditional at common law, and the reversionary interest of the person who granted it, were to vest in the same person, which would create a merger. It is not the union of two concurrent co-existing fees; but it is the case of one limited and determinable fee, and of another fee not concurrent, but created *de novo* by a mode unknown in early times to commence *in futuro* upon the ending of the limited fee; and until such limited fee ceases, it has no existence nor any thing beyond the chance of future existence. The second fee is not the old reversion waiting upon the limited fee, and constantly *in esse* whilst that limited fee continues; but it is a new fee, which will never be *in esse* until the limited fee ceases. No act done by the owner of the limited fee, during the continuance being dead, there was none to make a decree against. If any thing of the sort that was prayed for could be done, it must be in the Court of Exchequer, which was a court of revenue, and the proceedings in a petition of right; though called a petition, as much a legal proceeding as by original writ. Suppose this land had been seised and put in charge, could he make any decree relating to it? None. But the Court of Exchequer could. He could neither decree the Crown to sell, nor the plaintiff to hold and enjoy against the Crown. The bill was dismissed; 2 Atk. 223.

* Regularly, every disposition by one joint-tenant, in order to bind his companion, must be an immediate one; for the other joint-tenant claiming the whole, under the original feoffment or grant, the whole must descend to him, unless his companion has disposed of his share in his life-time: from which it follows that a devise can in no case operate as a severance of a joint tenancy; it being a maxim of law, that *jus accrescendi præfertur ultimæ voluntati*; 2 Cru. Dig. 452.

† A devise of land out of which a future use is limited, will destroy such future use, but a devise of portions out of land will not destroy it; for such a devise does not alter the freehold; Moor. 731; Gilb. Uses, 126; 2 Cru. Dig. 328.

‡ Soon after the statute of wills, it was found that the power of devising was attended with some very material inconveniences; for creditors by bond or other specialty, which affected the heir, provided he had assets by descent, were defrauded of their securities, not having the same remedy against the devisee of their debtor. But, by the statute 3 W. & M. c. 14. (it has been seen, ante, vol. iv. p. 652.), it is enacted (s. 2), that all wills and testaments shall be deemed and taken, only as against creditor or creditors by bond or other specialty, in which the heirs are bound, their heirs, successors, executors, administrators and assigns, to be fraudulent and utterly void; with an exception (s. 4) of devises for payment of debts, or children's portions, pursuant to a marriage agreement. Mr. Fonblanque (Tr. Eq. B. 1. c. 4. s. 14.) has observed that, in consequence of this exception, bond and other specialty creditors, whose demands do in their nature affect the lands, are still liable to be prejudiced by the right of their debtor, to devise his real estate; for if he devise, subject to the payment of his debts, his simple contract creditors will by such devise be entitled to be paid *pari passu* with his bond or specialty creditors; because, in conscience, their debts are to be equally favoured, being equal.

The devise of a reversion expectant on an estate tail is fraudulent, as against creditors; 2 Atk. 204.

of such limited fee, will enable the person in whom the chance to the second is vested to interfere. This is a case, therefore, of *successive*, and not of *concurrent co-existing fees*; and in the case of successive fees, the authorities are against the merger. It would possibly have been of no great prejudice when the question was first raised, if the concurrence of two such interests in the same person had been held to coalesce; but we are not aware that any advantage would have resulted from it; and in this instance at least it would have militated against what we must suppose to have been the testator's intention. By limiting the fee to the widow in this case, the testator must be taken to have intended that if the death under 21 should occur, and the widow should do nothing to break the course of descent, the descent should be in their heirs, not in the testator's; and this supposed intention would have been frustrated, had the interest been adjudged to have coalesced. For these reasons, the heir *ex parte materna* is the person entitled to the property. See Co. Litt. 234 a, 313. a, 4 Rep. 66. b; 10 id. 49. b: 2 Freem. 250; 2 P. Wms. 608; 3 id. 372; 1 Ves. 409; Pollexf. 51; Willes, 211; 4 Mod. 1; Carth. 257; 1 Salk. 338; Doug. 778; Willes. 444 —8; 3 Ves. jun. 339; 2 Wils. 29; Shepp. Touchstone, 154; 1 Bl. Rep. 519; 9 East, 306; Cro. Jac. 590; Godb. 4; 9 Mod. 363; 6 East, 289; 7 Ves. 583; 10 id. 246; 3 B. & P. 655; 2 N. R. 383; 1 Burr. 234; Doug. 778; 2 Atk. 204; 4 Bro. P. C. 594.

VII. RELATIVE TO THE REMEDIES AT LAW CONNECTED WITH DEVISES.

(A) FORM OF ACTION.

1st. *Where devisee is plaintiff.*

ANON. H. T. 1674. K. B. 2 Mod. 7.

It was in this case held that a devisee could not, before entry, maintain trespass; *et vide* Bridgm. Judg. 495.

2d. *Where devisee is defendant.*†

(B) PLEADINGS.‡

PLASKETT V. BEEBY. H. T. 1804. K. B. 4 East, 484; S. C. 1 Smith's Rep. 263.

Declaration in debt on bond against (amongst others) certain parties within age, who were described as devisees under the last will of A. B. Demurrer of parol. Demurrer thereto, and joinder.

Per Cur. This case depends on the statute of 3 W. & M. c. 14. The statute has by the second section made the devisee liable in respect of the lands devised for the specialty debts of his testator, for which the heir was before liable, if the lands had descended to him. Before that act, the devisee of the realty could not have been made liable in such an action as the present, and now he is only liable according to the terms of that statute; but to that extent he is liable, and is not entitled to any privilege not conferred on him by the act. As therefore the privilege of making the parol demur for nonage is nowhere given by the act to the devisee, and there is no case in the books which

* Where a devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised; Co. Litt. 240. b.; but, if it be a legacy for a term of years he must first obtain the assent of the executors to the bequest; *Younge v. Holmes*, Stran. 70. When, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger; *Doe, d. Lord Say and Sele, v. Guy*, 3 East, 120.

† A devisee in trust, not having been in possession, was permitted to defend in ejectment; 4 T. R. 122.

An action of covenant, it has been seen, (*vide ante*, tit. Deed, vol. vii. p. 639.) does not lie against the devisee, under the act 3. W. & M. c. 14. s. 2., as the remedy is expressly pointed out by the statute.

‡ The title of a surrenderee is not complete before admittance, which he must prove; but after admittance, his title has relation to the time of surrender against all persons; and he may, therefore, recover in ejectment, upon a devise had between the time of the surrender and the admittance, provided the admittance be before the trial; *vide ante*, vol. vi. pp. 433. n. 512.

Ejectment is maintainable by a devisee before entry,* but not trespass, [342]

An infant devisee can not pray the parol to demur,

The best proof of a will is the production of the instrument, and which [343] is not, therefore, to be dispensed with, if it can be had. An exemplification or probate of the will, is not evidence.

If the will is lost, the register book, or ledger book;

Or an examined copy, should be produced; or, if there be no [344] such copy, time when the defendant entered, it became necessary to prove the will of one J. P. It was stated that he had devised the premises to his widow for life, and that she had demised them to the defendant by a lease which became void upon her death. The lessors claimed as devisees in trust of R. P. the brother of J. P. and remainder-man in fee after the life-estate to the widow. It was sworn that search had been made for the original will at Doctor's Com-

gives it to any other than an heir at law, we must give judgment for the plaintiff. See Doug. 311 b, 1 And 21; Co. Litt. 32. a; 1 Danv. Abr. 63. c; 3 P. Wms. 33; 3 Rep. 13. a; Bro. Abr. Parol. Dem. pl. 16; Bro. Age, pl. 36; Fitz. Abr. Age, pl. 73; Het. 59; 2 Anstr. 596; Willes, 524.

(C) EVIDENCE.

1st. On plaintiff's part.

1. By devisee of freehold.

(a) Seisin of testator.*

(b) Execution of the will.†

1. EVANS v. HERBERT. E. T. 1664. K. B. 2 Keb. 35.

In ejectment, the defendant claiming under a devisee, showed a bill in Chancery preferred by the heir, under whom the lessor of the plaintiff claimed against such devisee, whereby the will was set forth, and also the answer in which it was confessed; it was held that this was no evidence.

2 ANON. E. T. 1687. K. B. Comb. 46.

In this case (which was an action of ejectment) the Court held, that a will exemplified under the great seal could not be produced as authentic, for the consideration of a jury.

3. ST. LEGAR v. ADAMS. K. B. 1 Ld. Raym. 731.

In ejectment, it appeared upon the evidence that a will made of the lands in question in 1647, had been lost, but that mention was made of it in the calendar (which is the index of the register of the Spiritual Court), and also in the seal book. A commission issued in April 1648, to examine the executors upon their oaths, &c., and that being returned, probate was granted in May, 1648, which probate was produced in evidence. Holt, C. J. allowed it at the assizes to be good proof of the will, but he reserved it for his further consideration. And afterwards, as well in the King's Bench, as at Nisi Prius, upon other trials, declared that he held it to be good evidence, and that he continued of his former opinion.

4. DOE, D. ASH, v. CAVERT. H. T. 1810. N. P. 2 Campb. 387.

Action of ejectment by a landlord against his tenant. To show the exact time when the defendant entered, it became necessary to prove the will of one J. P. It was stated that he had devised the premises to his widow for life, and that she had demised them to the defendant by a lease which became void upon her death. The lessors claimed as devisees in trust of R. P. the brother of J. P. and remainder-man in fee after the life-estate to the widow. It was sworn that search had been made for the original will at Doctor's Com-

* Where the lessor claims a freehold interest by devise, he must, in the first place, establish the seisin of the testator. This may be proved by showing the ancestor in actual possession, or that he received rent from the person in possession, which is presumptive evidence of seisin in fee; Co. Litt. 15. a. B. N. P. 162; 4 Taunt. 326. So, proof of his possession of the premises by the ancestor's lessee for years is evidence of seisin; for the possession of tenant for years gives an actual seisin to the owner of the inheritance; Co. Litt. 243. a.; 3 B. & C. 193. So, the possession of a guardian in socage confers an actual seisin upon the infant; 3 Wils. 516. The declarations of a deed-trust, that he held under the particular person, are admissible to prove the seisin of that person; 4 Taunt. 16.

† And in case there are any estates limited by the will, prior to the devise to himself, the determination of such estates.

‡ The Ecclesiastical Courts have no jurisdiction over wills of land only; therefore, if they attempt to proceed in proving them by compulsion, a prohibition lies; but if no objection be made, they may be proved there; vide 3 Keb. 30. 51.; 1 Vent. 267. Cro. Car. 196. And formerly, a prohibition was granted absolutely, where lands and chattels were disposed of by the same will; but, afterwards, it was granted only as to the lands. Now, prohibition, does not go as to either; for, where a will is concerning lands and goods, and is one entire will, it shall be proved entirely in the Spiritual Court, to enable the executor to sue for debts which otherwise might be lost, and to expedite the payment of the legacies, which, if it were not so, might be longer delayed, and the will, consequently, unperformed; 2 Roll. 315; 1 Sid. 141; et vid. Cro. Car. 196; Egerton v. Egerton, Cro. Jac. 345; Stroud's Case, 2 Keb. 838. 74; Hudson v. Fisher, Rep. J. Holt. 180, Comberb. 46. Besides, as to granting prohibition quoad the land, it is vain; for the probate of the will for the land cannot prejudice the heir, because it is no evidence at common law; nor can the examinations of the witnesses there be given in evidence at common law, it being, as to the lands, a proceeding coram non iudice; 3 Atk. 516; Powell on Dev. ch. xv.

mons in vain. The probate was then tendered as evidence. Lord Ellenborough held it inadmissible, and said that in the absence of the original an examined copy should have been produced.

5. *LOWE v. JOLLIFFE*, E. T. 1762. K. B. 1 Bl. Rep. 365.

This was a case directed out of chancery. The issue was *devisavit, vel non*. The subscribing witnesses to the will all unanimously swore that the testator was utterly incapable of making a will, or transacting any other business at the time of making a will, or at any intermediate time. To encounter this evidence, several persons who had been on terms of intimacy with him were called. The Court admitted such proof.

6. *DOE, D. STEPHENSON, v. WALKER*, T. T. 1801. K. B. 4 Esp. 50.

Ejectment to recover lands. The lessor of the plaintiff claimed in the character of devisee under a will. A trial had been previously had, in which defendant had recovered as heir at law, on the ground of total incapacity in the testator to make any will at the time the present will was supposed to have been made. On this trial, it appeared that there had been three subscribing witnesses, and that two were dead. The will was again attempted to be impeached by the testimony of the survivor, who swore that he was brought by the devisee, in company with the two deceased witnesses; that he was, about 11 o'clock at night, called into testator's room, when the will lay upon the table, signed by the other two, and that testator's hand was guided, and her name so subscribed, without her seeming to know what she did. The credit of this witness was, however, shaken by the cross-examination. It was, there-

* And where a will remains in Chancery by order of that court, a copy may be given in evidence; for then it becomes a roll of that court, and by consequence, a copy of it is sufficient evidence; Gilb. Law of Evid. 74. (But the authorities cited in Keb. 40. 117. do not support this position.)

It has been already seen, *ante*, p. 115. that it is necessary by the Statute of Frauds that all devises be signed by the testator, or by some other person in his presence, and by his express direction; and (*ante*, p. 117.) that it be attested and subscribed in the presence of the devisor by three or four credible witnesses. Notwithstanding some earlier cases to the contrary, it seems to be now the established rule, that proof or sealing, without signing, is not sufficient; 1 Wils. 313; 2 Ves. 459; all. N. P. 263. But proof that testator signed his name at the beginning of his will, will satisfy the statute; 1 Emayne v. Stanley, abridged, *ante*, p. 115. But if the evidence show that the will was written on several sheets, that testator signed some, and intended to sign the rest, but did not, the Court will consider the instrument as invalid; Doug. 241. abridged, *ante*, p. 116; *sed vide* Winsor v. Pratt, abridged, *id*.

The statute does not direct that the witnesses should see the testator sign. It should, however, be proved, that the testator acknowledged to the witness, either separately or all together, that the will or hand-writing was his, *ante*, p. 117. If the witnesses set their marks to the will, it is a sufficient attestation; 8 Ves. 185; and evidence need not be adduced that they attested it at the same time; *ante*, p. 123 n. It will not be essential to show that the witnesses attested every page, or even knew the contents; but it should be proved that all the will was in the room at the time of attestation: 3 Burr. 1773, *ante*, p. 118; Carth. 35, *ante*, p. 121. By the statute, the witnesses must attest and subscribe the will in the presence of the testator. It is, however, enough, to prove that the testator was in such a position that he might see the witnesses attest; Shiras v. Glasscock, *ante*, p. 119; Day v. Smith, *ibid*; Doe v. Manifold, *ante*, p. 120.

In a court of law, a will 30 years old, if the possession has gone under it and sometimes without the possession; but always with the possession, if the signing is sufficiently recorded, proves itself; but if the signing is not sufficiently recorded, it is a question, whether age proves its validity; and then possession under the will and claiming and dealing with the property, as if it had passed under the will, is cogent evidence to prove the duly signing, though it should not be recorded; 6 Dow. 202; Peake's Ev. App. 91. It seems that the 30 years should be computed from the date of the will, and not from the death of the testator; 9 Ves. 5; 4 T. R. 707; 3 Stark. Ev. 1694; Roscoe's Evidence, 59.

The defendant may impeach the will, either by showing that it is a forgery, or by proving the incapacity of the testator to make a will. This incapacity may arise, either from coverture or infancy, or from idiocy, or an insane memory; or it may be shown that the will was made under duress, or obtained by fraud; *vide ante*, p. 97 to p. 103. The defendant may also show that the will was revoked; *vide post*, p. 346.

† When the witnesses are dead, their hand-writing, and that of the testator should be proved; and though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will; 2 Str. 1109; Willes, 1; Com. 531, *ante*, p. 121.

will not be received as such evidence.*

Even tho' all the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. And where two of the witnesses are dead,† and the surviving witness charges them with fraud in the attestation of the will, evidence of

[345]

their good character is admissible.

fore, proposed to call witnesses to the characters of the two deceased witnesses. It was contended that such proof could not be adduced; and this distinction was taken, that, where a particular fraud is imputed to a party, general evidence to character is inadmissible, but that it is otherwise, where general character is put in issue. Lord Kenyon, however, admitted the evidence, and plaintiff had a verdict.*

- (c) *Death of the testator.*†
- 2. *By devisee of leasehold property.*
 - (a) *Execution of lease.*‡
 - (b) *Probate of will.*

REX v. NETHERSEAL. E. T. 1791. K. B. 4 T. R. 258.

Where a real estate, claimed under a will, is only leasehold, nothing but the probate of the will, with the will annexed, is legal evidence of the will.‡

A. B. occupied a tenement of 10l. a year, and died, leaving three children, to two of whom he bequeathed 5l. each, and to the other, whom he made executrix, the residue of his property. The pauper, who had before married the executrix, resided on the tenement above 40 days, and paid rent for it. The Court held that this gained him a settlement, though the wife never proved the will, but said: if the question depended on the title which the pauper claimed under the will in right of his wife, we think that the facts stated in this case would not warrant us in deciding that any right could be enforced under the supposed will, because the fact of there being a will should have been proved in a different manner. We cannot receive any other evidence of there being a will in this case, than such as would be sufficient in all other cases where evidence of titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will in all questions respecting personality.

- (c) *Assent of the executor to the bequest.* (1)
- 3. *By devisee of copyhold.*
 - (a) *Admittance of testator.* (2)
 - (b) *Execution of will, and in some cases surrender.* (3)
 - (c) *Admittance of devisee.* (4)

VIII. RELATIVE TO THE REVOCATION OF DEVISES. (5)

(A) EXPRESS REVOCATION.

1st *By means of a subsequent will.*

1. *In what cases it in general produces such effect.*

1. THOMAS, D. JONES, v. EVANS. T. T. 1802. K. B. 2 East, 488.

A testator devised his real estate to A. and his personal estate to B.; he af-

* A third trial was afterwards had in the court of C. P., by the verdict in which the will was again established; 4 Esp. 52. n.

† Proof of this fact is of course necessary to complete the requisite evidence.

‡ A devisee of leasehold interest must, in the first place, prove the execution of the lease by the lessor; or, if the testator was an assignee, the execution of the lease, and the assignment to him; see Starkie, Phillips, and Roscoe's Evidence.

§ When probate is granted of a forged will, till avoided by a competent ecclesiastical jurisdiction, it is unimpeachable; and, even when avoided, all transactions under it stand good; 3 T. R. 126.

1 This, it has been already seen, is requisite to enable a testator to devise leasehold property. By the assent, the lease is vested in the devisee from the death of the testator; 5 Rep. 12. b; 3 East, 120. A very small matter will amount to an assent, it being a rightful act; 1 Vern. 94.

2 A devisee of copyhold premises must first prove the admittance of the testator Yelv. 145.

3 The devisee must prove the will; and in cases not within the statute 55 Geo. 3. c. 102. (ante, vol. vi. p. 410.) which dispenses with such surrender, a surrender to the use of the will; ante, vol. vi. 515. n.

4 Although in ejectment against a stranger, the heir of a copyholder, or the grantee of the reversion of a copyhold from the lord, need not prove an admittance, yet a devisee being a purchaser must prove his admittance; vide ante, vol. v. vi. p. 515. n. The admittance of tenant for life being the admittance of the heir in remainder, a devisee in remainder has only to prove the admittance of the tenant for life, and not his own admittance; ibid. The surrender and admittance may be proved by the original entries on the court-rolls of the manor, or by copies of the court-rolls of the admittance and surrender properly stamped, with evidence of the identity of the parties admitted; vide ante, vol. vi. p. 513 to p. 516.

5 To be revocable is an essential property of every testamentary instrument, and seems

Words declaring on ly a future intention to revoke were not considered a revocation before the Statute of Frauds

terwards purchased lands in X. B. died in his life-time, whereupon, by a subsequent will, he devised away a reversion in fee, which had been given to him since the making of the former will, and at the conclusion of the subsequent will, added, "that as to the rest of his real and personal estate, he intended to dispose of the same by a codicil to that his will thereafter to be made," and afterwards died without doing any other act to revoke his will; held, that these words, declaring only an intention to revoke, did not amount to a revocation. [347] (Cro. Jac. 497.) nor are they since, not withstanding the instrument containing words of an intention to revoke be executed according to the direction of the statute. But a subsequent will expressly revoking, or clearly inconsistent with a former one, suffices. The *animus revocandi* is, however, a material ingredient in the act done.* If it be merely found that another, or even a different disposition has been made by the testator from that which he

2. HITCHINS v. BASSET. T. T. 693. K. B. Salk. 592; S. C. Comb. 90; 1 Show 537; S. C. 3 Mod. 293. S. P. HARWOOD v. GOODRIGHT. Cowp. 87; S. C. 3 Wils. 497; S. C. 2 Bl. Rep. 937; S. C. 7 Bro. P. C. 489. S. P. ROYER v. RATCLIFFE. E. T. 1714. K. B. 10 Mod. 233.

Ejectment. From the terms of a special verdict, it appeared that A. B. being seised in fee, made his will, and devised his lands to B. for life; remainder to C. in fee; that A. B. made *aliud testamentum* in writing, but that the jury were ignorant of the contents of that will. The question was, whether the first will was revoked; on the one hand, it was contended, that a subsequent will was not in all cases a revocation, as a devisee might dispose of his interest in certain property in one will, and afterwards by another will convey what he might be seised of in other property of the same species as he had previously devised; so if a person purchased lands after he had made his will, it was not obligatory upon him to execute his will over again; it was not only necessary that he should direct to whom the after-acquired property was to go, from which it was argued, that the *aliud testamentum* might be consistent with the disposition previously made, and not operate as a revocation. On the other hand, it was insisted that revocations were favoured, because they tended to restore property to the heir, which would otherwise have passed from to be almost an inevitable consequence of its posthumous character. Instruments taking effect, inter vivos, may indeed be made revocable; but as this results from the express provision, and not from the nature of the instrument, the power of revocation is of course confined within the terms of that power. Testamentary appointments in execution of powers, it may be observed, partake of all the qualities of wills, properly so called, including that of their revocable character. Every appointment by will, therefore, may be revoked by another instrument of the same kind sufficient, according to the terms of the power to make another disposition of the property. Devises of lands made under the particular customs of boroughs, or by virtue of the statute of wills, might have been revoked by words only, without writing, the statutes of wills giving power to any person seised in fee of lands, to devise them by writing; but being silent as to revocations. This was remedied by the sixth section of the statute of frauds, by which it was enacted, "that no devise in writing of any lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing, or obliterating the same; by the testator himself, or in his presence, and by his directions and consent. But all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid; or unless the same be altered by some other will or codicil, in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same."

* Questions frequently arise in consequence of the testator having subjected one property to the same limitations as another, and then revoked or altered the limitations of the principal estate only. On this subject, it has been decided, that where a testator by his will annexes one estate to another, declaring that the same shall go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom; and by an act in his life-time, revokes the devise of the principal estate, the property so annexed is not affected, but goes according to the uses declared of the principal estate by the will; Darley v. Langworthy, 3 B. P. C. Tomlin. edit. 359. reversing Lord Camden's decree in Darley v. Darley, Amb. 653; see also Lord Sidney Beaucherk v. Mead, 5 Atk. 167.

Where the testator, instead of simply revoking in toto the devise of the estate to which the other property is appended, as in Darley v. Langworthy, merely modifies the limitations, another question arises, namely, whether the annexed property is to undergo a similar modification. The negative might seem to follow, from the principle of Darley v. Langworthy; but, in a late instance, the principle governing a case of total revocation and of alteration merely was considered to be different; and, accordingly, in the latter case, both devises were subjected to the modification; 5 Ves. 404. Here it may be observed that, where two unmarried sisters made mutual will, and the will of one of them was revoked by marriage, it was held that the other remained unrevoked; Hinchley v. Simmons, 4 Ves. 160. Where a testator, in a codicil, recites an inconvenient consequence to result from a

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willed; yet
if it do not
appear to
the Court
what that
difference
[349]
is, it will
not operate
as a revoca-
tion.

A devise
will be
null and
void, if tes-
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him. *Sed per Cur.* In the absence of proof, substantiating the fact, that the *aliud testamentum* refers to the same lands that the testator had in his view at the time he made his first will, we cannot decide that it operated as a revocation at law.

2. *Where the second will is not complete, per se.**

3. *Where two wills are inconsistent.†*

2dly. *By means of a codicil.‡*

3dly *By means of a written declaration.*

HILTON v. KING. H. T. 1682. C. P. 3 Lev. 86.

A person devised certain estates to his daughters, D & S.; afterwards the testator having an intention to revoke the will as to D., directed the following words to be written on his will: "We, whose names are underwritten, do testify that the above-named A. (the testator) did the day of the date hereof, publish and declare, that the several clauses and devises in his will, any way relating to his daughter D. should cease and be void, she being since married, and her portion paid: In witness whereof, we have hereunto set our hands," &c. and the same was subscribed by four witnesses, in the presence of the testator, but he did not sign the same, nor any other person, by his direction. Adjudged that this was not a revocation.

4thly *By cancellation or obliteration.*

1. *What amounts to,*

devise in his will, as that, in a particular event, the devisee or legatee, would be unprovided for contrary to his intention, and afterwards, instead of confining himself to simply effecting the declared purpose of the codicil, goes on to revoke the whole devise, and devise the land again to the trustees upon the same trusts (with the exception of the particular expressly intended for correction,) but omitting one of them; this omission, though probably undesigned, cannot be supplied; *Holder v. Howell*, 8 Ves. 97. It is difficult to reconcile with the principle of this case the decision in *Matthews v. Bowman*, 3 Anst. 727. where a testator having devised the residue of his estate to his daughters, as tenants in common, by a codicil made for a particular purpose, devised it to them, but omitting the words of severance; it was held that the codicil was to be construed by the will, and that they took as tenants in common.

* Where a will, duly attested, charges the real estates of the testator with the payment of debts and legacies, a subsequent unattested will or codicil, giving legacies, will be sufficient to pass such legacies. It has been determined, upon the same principle, that in cases of this kind, a second unattested will or codicil shall be sufficient to revoke legacies given by the first will; 6 Cru. Dig. 84.

† If one, having made a will, afterwards make another will consistent therewith, but not expressly revoking it, this will, nevertheless, be a revocation; *vide* 3 Wils. 511, 512. Thus, if a man devise his land to two, and, by another will, give it to one of them, and die, he to whom it is devised by the last will shall have it; *vide* 3 Mod. Rep. 206. So likewise, if a testator, by one will, give lands to his son, and, by another will, devise the same to his wife (*ibid.*;) or, by one will, make A. executor, and by a subsequent will constitute another person (*Year Book*, 2 R. 3. fol. 3.,) the former will is revoked. If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the heir is let in; but, in every case, the Courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole; *Phipps v. Earl of Anglesea*, 7 B. P. C. Toml. edit. 443.

‡ A codicil, if inconsistent with a preceding will, is in law an express revocation of it; 3 Atk. 582; 8 C. 1 Ves. sen. 32. But a codicil is in its own nature not intended to be a revocation of the will, or of the particular dispositions therein, further than the same are specially altered the by, and precisely in the degree expressed. Thus in a late case, where a testator devised his estates to C. B. for life, without impeachment of waste, and by a codicil directed his trustees to let until tenant for life married; the leases to be impeachable of waste, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was contended, that this was inconsistent with, and therefore revoked the devise for life, without impeachment of waste; But Sir W. Grant held that there was no inconsistency, and nothing to take the timber from the tenant for life; see 1 Ves. sen. 178. 186.

§ It is observable that the statute of frauds (s. 5.) requires, that in devises of lands, the three witnesses should subscribe the will in the presence of the testator. But the clause relating to revocations (s. 6.) only requires that the deviser should sign in the presence of three witnesses, without requiring that the witnesses should subscribe in the testator's presence; 6 Cru. 86.

1. *BIBB v. THOMAS*. M. T. 1775. C. P. 2 Blac. 1043.

In this case, one P., who had frequently declared himself discontented with his will, ordered his servant, M. W. to bring it; she delivered it to him, it being then whole, only somewhat erased. He looked at it, opened it, then gave it a rip with his hands, and so tore it, rumpled it together, and threw it on the fire, but it fell off, but would have been burned had not M. W. taken it up, and put it into her pocket. P. did not see her take it up, but seemed suspicious, and asked what she was at, to which she made little or no answer; he several times after said that was not and should not be his will, and bid her destroy it. She said at first, so I will, when you make another; but afterwards upon his repeated inquiries, she told him she had destroyed it, though, in fact, it was never destroyed, and she believed he imagined it was so. She asked him when the will was burnt, to whom the estate would go; he answered, to his sister and her children. He afterwards told one S. E. that he had destroyed his will, and should make no other till he had seen his brother, J. M. and desired S. E. would tell him so, and that he wanted to see him. He afterwards wrote to J. M., in these terms: "Dear brother, I have destroyed my will, which I made upon serious consideration; I am not easy in my mind about that will;" and afterwards desired him to come down, "for if I die intestate, it will cause uneasiness." He, however, died without making any other will.

The jury, with whom the judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the heir. A motion was made for a new trial. *Per Cur.* This is a sufficient revocation. A revocation under the statute may be effected either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself; viz. burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent; but those must be done *animo revocandi*, each must accompany the other. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these, and if these or one of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burnt or torn to pieces. The present case falls within two of the specific acts described by the statute. It is both a burning and a tearing; throwing it on the fire, with an intent to burn, though it is very slightly singed and falls off, is sufficient within the statute.

2. *DJE, D. PERKES, v. PERKES*. E. T. 1820. K. B. 3 B. & A. 489

A testator being angry with one of his devisees named in his will, began to tear it with the intention of destroying it, and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who seized his arms, and partly by the intreaties of the devisee. Upon this he became calm, and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse. The Court held, that it was on these facts properly left to the jury to say, whether he had completely finished all that he intended to do, for the purpose of destroying the will; and the jury having found that he had not, the Court of K. B. refused to disturb the verdict, and supported the will.

2. *As to a partial obliteration.*

1. *WINSOR v. PRATT*. E. T. 1821. C. P. 2 B. & B. 650; S. C. 5 Moore, 484.
S. P. *BURTONSHAW v. GILBERT*. Cowp. 52. Loft. 465. S. P. *SHORT, D. GASTRELL, v. SMITH*. 4 East, 418. S. P. *SUTTON v. SUTTON*. Cowp. 812.

The testator devised certain real estates to his wife for life, and on her death to J. S., and on the death of both, to his executors in fee, upon certain trusts. Some years afterwards he made various interlineations and obliterations therein, confining the first devise made to his wife to her widowhood, and striking out the devise to J. S.; and erasing the original date, and substituting the day of Nov. instead thereof, and the will was never re-signed, re-published, nor re-attested, but a fair copy was afterwards prepared, and the testator added

an interlineation therein, not affecting his real estate, but which copy was never signed, published, or attested, and the will thus altered and a fair copy were found locked up in a drawer together, at the residence of the testator, after his death. The Court said the will is well executed, all the evidence of an intention to revoke appears on the face of the will itself; but if the testator had intended to affectuate such cancellation, it is not too much to suppose he would have destroyed the will. It seems to us that the testator did not mean to revoke the devises altogether, or to die intestate, but to make another will, merely altering some of the devises; however, we take the rule to be that where a testator designs to revoke a former will by an instrument, making new dispositions of his property, he discovers only a conditional intention to revoke, or in other words his intention to revoke is so coupled in appearance with his new testamentary act, that unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. We are therefore of opinion, that the testator only intended to carry the alterations into execution by a future will, which intention he never carried into effect, consequently the original will is not void.

2. *LARKINS v. LARKINS*. H. T. 1802. C. P. 3 B. & P. 16. 109.

But only to the extent of that obliteration.

A testator devised a real estate to three trustees and their heirs, upon trust to sell. Some time after, the testator struck out the name of one of the trustees by drawing a pen through it, and the question was whether the devise to the trustees was revoked by the erasure of the name of one of them after the execution of the will. The Court, after observing that a revocation by obliteration would have the same effect which a revocation by any other means would have, and no more, and that the devisees must be considered in a court of law as joint tenants in fee, absolutely certified that the devise of the estate to the two trustees, to whom together with the third trustee, the said estate was devised as joint tenants in trust, to be sold, was not revoked by the testator's having struck out the name of the third trustee after the execution of the said will.

[352]

As it is in all cases requisite that there should be *animus revocandi*.

3. *SHORT, D. GASTRELL, v. SMITH*. M. T. 1803. K. B. 4 East, 418.

A. B. devised lands to two trustees in trust, for certain purposes, by a will duly executed and attested, and he afterwards struck out the name of one of those trustees, and inserted the names of two others, leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not republish his will. The Court held that his interest appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect, for want of the proper requisites of the statute of frauds, it should not operate as a revocation, or at most it could only operate as a revocation, *pro tanto*, as to the trustee whose name was obliterated, leaving the devise good as to the old trustee, whose name was retained. See Cowp. 52; 2 Vern. 743; 1 P. Wms. 343, 344. r; 1 Eq. Ca. Ab. 407; 1 Ves. 178. 186; 9 Mod. 18; 3 Bro. P. C. 107; Carth. 30; 3 Com. Dig. 10. 11; Dy. 4. a; 310 b.

3. *When there are duplicates.*

BURTONSHAW v. GILBERT. E. T. 1774. K. B. Cowp. 49; S. C. Lofft. 465.

When there are duplicates of a will, one only in the custody of the testator which he cancels, this is a cancelling of the other.

N. N. made a will in 1759, of which he executed a duplicate, and gave it to another person; he made a second will in 1761, at which time he cancelled one of the copies of his first will, by tearing off the seal. After the testator's death, both the first and second wills were found together in a paper cancelled; and the duplicate of the first will was found uncanceled, in the testator's room among other papers. It was determined that the testator had died intestate; for the cancelling the copy which the testator had in his possession of the first will was a cancelling of the duplicate; and therefore at the time of making the second will the first was upon every principle of law most clearly revoked, and could never be set up again but by a re-execution.

4. *Admissibility of parol evidence to explain an apparent act of revocation.**

* In the case of a revocation by the execution of conveyance of lands, subsequent to a

(B) IMPLIED REVOCATIONS.

1st. General rule.

HARWOOD, v. GOODRIGHT, L. ROLFE. T. T. 1774. K. B. Cowp. 87. affirmed Dom. Proc. 7 Bro. P. C. 489; S. C. Lofft. 558. reversing judgment in C. P. 3 Wils. 497; S. C. 2 Bl. Rep. 937.

This was a writ of error from the Court of C. P. It appeared that in that court, on a special verdict, in ejectment, the jury found that L. seised in fee of chambers, and having a considerable personal property in 1748, by will duly attested to pass real property, devised all his real and personal estate; that afterwards in the year 1756, L. made and published another will and testament in writing, in the presence of three subscribing witnesses, who duly attested the same, that the disposition made by L. in the year 1756, was different from the disposition in the will of the year 1748, but in what particulars was unknown to the jurors; but that they did not find that the testator cancelled his will of the year 1756, or that the defendant destroyed the same; but what was become of the said will, the jurors said they were altogether ignorant. The question was whether the latter will being expressly found by the jury to be different from the former, was a revocation of it, and the Court of King's Bench, reversing a judgment of the Court of Common Pleas, held that it was not. Lord Mansfield observed that as the jury had declared that they did not know wherein the difference consisted, the Court in such a case could not presume the difference.

Revocations which prior to the statute of frauds.

were strictly interpreted, even at common law, and not extended by latitude of construction to defeat an established will, are not of course;

since that act, which meant to guard against all constructive devises not resulting from the necessary act of law, or the declared solemn intent of the party, to be implied and collected by conjecture.

2d. Marriage,* or the birth of a child.

1. LANCASHIRE v. LANCASHIRE M. T. 1792. K. B. 5 T. R. 49. S. P. CHRISTOPHER v. CHRISTOPHER. 4 Burr. 2182. S. P. SPRAGGE v. STONE. 1 Doug. 35.

A. being a bachelor, devised lands to his nephew, and afterwards married. Upon his wife's becoming pregnant, he expressed an intention to revoke his will, and gave directions to an attorney to prepare another will, but died before it was ready. After his death his widow was delivered of a child, who brought an ejectment against the devisee. Lord Kenyon said, it had been solemnly decided that marriage and the subsequent birth of a child amounted to a revocation of a will made before marriage. Perhaps the foundation of that principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself, at the

devise of them, parol evidence is not admissible to prove that the testator meant his will should remain in force and unrevoked by the subsequent conveyance; 2 Ves. jun. 606; 2 H. Bl. 516.

As to the effect of a woman's marriage on her will, made previously thereto, it seems to be questionable whether the circumstance of marriage alone amounts to a presumed revocation; but it is perfectly clear that it at least suspends the will during the coverture; so that, if she die previously to the determination thereof by the death of her husband, her will is thereby countermanded; because, the making of a will is but the inception of it, and it doth not take any effect until the death of the devisor; for, *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum vitæ exitum*, (vide Forse and Hembling, 4 Rep. 61; S. C. 1 Anders. 181; Gouldsh. 109.) And then, as the law will not allow that a feme covert may make any devise, for the presumption of the law is, that it will be made by constraint of the husband, so the law will not suffer the continuance thereof after marriage; for the presumption that the husband, by constraint, might cause her, against her will, to revoke or continue it. Therefore, as it would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it; and, as to permit a *feme covert* to revoke her will would be open to the objection of compulsion, the law, to avoid both inconveniences, considers the taking of a husband, being a woman's own act, to amount to a countermand in law, at least so long as the coverture continue. But if the husband die, leaving the wife surviving, then the will, it seems, will revive, because it does not take effect until her death, at which time she was discover, as she was at the time of making the will; vide Plow. Com. 341; Fitz. 231. And here it may be observed, that where, by articles previously to the marriage of a *feme sole* a power of disposition is given her, it will be construed to extend to wills made during the coverture only, unless the contrary be expressed; and, in such case, an ante-nuptial will, though subsequent to the articles, will be revoked by the marriage; Hodsdon v. Lloyd, 2 B. C. C. 534; S. C. Doe, d. Hodsdon, v. Staple, 2 T. R. 684; Powell on Dev. ch. xii.

Marriage together with the birth of a child, though posthumous;

the time of making it, that the party did not intend that it should take effect, if there should be a total change in the situation of his family. He cited a passage from Justinian's Institutes, and one from Vinuis' Comment, to show that, by the civil law, if the wife was pregnant, and a posthumous child was afterwards born, the will was utterly destroyed. And this confirmed the idea that these decisions did not proceed on the intention of the party, but on a tacit condition annexed to the will itself when made. For these reasons, therefore, standing on former decisions, and not extending them beyond the rule established and incorporated into our law, he was of opinion for the plaintiff, but disclaimed paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of frauds; which was passed in order to prevent any thing depending either on the mistake or the perjury of witnesses. But when the act intended to guard against frauds and perjuries, it left the court at liberty to take into consideration those circumstances which are not liable to prevarication.

2. *DOE, D. WHITE V. BARFORD*. E. T. 1815. K. B. 4 M. & S. 10.

And though the husband knew of his wife's pregnancy when he died, are circumstances which make an implied revocation of a will.*

A. B. married, and afterwards made his will, and devised to his niece, and afterwards died, leaving his wife *ensiente*, with a daughter, which was unknown to him. The Court held, that the birth of the child alone, even under those circumstances, was not sufficient to revoke the will, which was made after marriage; and Lord Ellenborough, (C. J. said, that he remembered the case of a sailor who had made his will in favor of a woman with whom he had cohabited, and afterwards went to the West Indies, and married a woman of considerable substance, and it was held, notwithstanding the hardship of the case, that the will swept from the widow every shilling of the property.

3. *SHEPHERD V. SHEPHERD*. Doug. 38. n. 10.

[355]
But neither alone is sufficient.

The following is the state of the facts in this case: Shepherd the testator having made his will, after some small legacies to his collateral relations, made his wife residuary legatee. After the making of the will, his wife was brought to bed of a daughter in 1763, upon whose birth the testator added a codocil, whereby he directed that the legacies should be paid, and that an annuity of 300*l.* per annum should be secured on the residuum, and paid to his daughter. The codocil and will were found together. In 1765 another daughter was born; and in 1768 a son, who was a posthumous child, the testator being dead about six months before his birth. Sir George Hay, in giving his opinion that the will was not revoked, delivered a very solemn and learned argument, in which he stated and examined a number of cases not in print, as well as those contained in the different reports.†

* There seems to be no case in which the marriage and birth of a child have been held to raise an implied revocation, where there has not been a disposition of the whole estate. It was a total disposition in the cases of *Christopher and Christopher*; 1 P. Wms. 204. n.; and *Spragge and Stone*, Doug. 35; and it always has been a total disposition in the cases of personal property; and it by no means follows, that a like presumption is furnished when the disposition is only of a part of the testator's effects, unless it can first be established as a clear proposition, that every man who marries, and has a child, must necessarily intend that all he has in the world shall become theirs. In *Brady v. Cubitt* (Doug. 31), Lord Mansfield observed that, in his recollection, there was no case in which a will, disposing of less than the whole estate, had been held to be revoked by marriage and having children; and Lord Ellenborough, in *Kenebel v. Scrafton*, (2 East, 541.) alluding to this dictum, said, that the rule was allowed, on all hands, only to apply where the wife and children were wholly unprovided for, and there was an entire disposition of the whole estate, to their exclusion and prejudice.

† The reason of the first branch of the above rule, it will be observed, is, because there is such a tacit condition annexed to the will; of the second, that otherwise there would be equal reason, for holding the birth of a child, after a numerous offspring, an implied revocation, which would do violence to a probable intention.

The civil law evinced a marked anxiety to guard children from the consequences of negligent omissions or capricious exclusion from the testamentary disposition of their parents. To exclude a son, it was not sufficient that he was not named in his father's will; but it was necessary expressly to disinherit him. "*Qui filium in potestate habet, curare debet,*

4. KENEBEL v. SCRAFTON. T. T. 1802. K. B. 2 East, 530.

A. devised certain lands to B. in trust, and directed him to pay, out of the rents and profits, an annuity to M. S. with whom he cohabited; and, in case he should leave any child or children by M. S., to raise a sum of money to be paid among his children; and then devised the remainder of his estate to several of his relatives; and afterwards A. married M. S., by whom he had several children. It was holden that the will was not revoked; either, 1st, on the ground of a tacit condition annexed to the will, viz. that it should be void in the event of a marriage and children, without provision, inasmuch as that condition; viz. of marriage, and of the birth of children unprovided for, had not taken effect; or, 2dly, on the ground of the intention to revoke; to be presumed, in favor of a wife and children unprovided for; because the fact upon which such presumption could be formed did not exist in the present case. are existing children, one of whom is heir apparent; Ves. 348; 1 Ves. & Bea. 390.)

The rule is, however, subject to two material exceptions; the first is, when the wife and children are provided for by the will; (the second is, where there

5. BRADY v. CUBITT. M. T. 1778. K. B. 1 Doug. 31.

In this case, Lord Mansfield said, that as marriage and the birth of a child only amount to an implied revocation of a former will, these may be rebutted at eum hæredem instituit, vel ex hæredem eum nominatim faciat. Aloqui, si eum silentio præterierit, inutiliter testabitur; adeo quidem ut, si, vivo patre, filius mortuus sit, nemo hæres ex eo testamento existere possit; quid scilicet ab initio non constituerit testamentum;” Just. Inst. lib. ii. tit. 13. And the rule was extended to the children of a son who was dead, or ceased to be under his father’s power; and was further extended by Justinian to all the children of a testator, female as well as male, and all the other descendants of the male line; lib. ii. tit. 13. s. 5. And, even the adoption of a child (in respect of which the civil law makes special provisions), was a revocation of an antecedent will. “Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem, eum, qui est sui juris, aut per prætorum, secundum nostram constitutionem, eum qui in potestate parentis fuerit: testamentum ejus rumpitur, quasi agnatione sui hæredis; Lib. ii. tit. 17. s. 1. The civil law, too, left it open to children to complain, not only that they were omitted in a will but that they were unjustly disinherited; and the suggestion in such a case was, that the testator was disordered in his senses; though, to support this allegation, it was only necessary to prove that the will was inconsistent with the duty of a parent; see Inst. lib. ii. tit. 18. *De Inofficioso Testamento*. Happily, these laws, so hostile to the spirit and genius of our free constitution, have never found a reception in this country, whose sound policy it has been to leave unfettered the power of disposing of property; 1 Powell, by Jarman, vol. i. p. 532. n.

And in one case,* it has been holden to follow, as a necessary consequence of an attempt made to set up the marriage and birth of a

It has never been decided whether the rule, that marriage and the birth of children operate as a revocation, requires that the children should proceed from such subsequent marriage; or would be satisfied by the circumstance of a married testator subsequently having children by such previous marriage, and then, having become a widower, marrying again; or, in other words, whether for the purposes of this rule, the birth of children and marriage, are equivalent to marriage and the birth of children; see 4 Ves. 849.

* In *Goodtitle v. Otway*, 2 H. B. 522. Eyre, C. J., said that, in cases of revocation by operation of law, the *presumptio juris* was so violent, that it did not admit of circumstances to be set up in evidence to repel it; and the learned C. J. observed, that this made it difficult to understand the case of *Brady v. Cubitt*, supposing that to be a case of revocation by operation of law, and within the statute of frauds. It is remarkable that Lord Chief Justice Eyre’s observations have been cited, as favouring the admissibility of the evidence; see *Kenebel v. Scrafton*, 2 East, 538. So, in *Doe, d. Lancashire, v. Lancashire*, 5 T. R. 61. Lord Kenyon and Mr. Justice Bullen strongly expressed their objection to, and disregard of, the parol evidence, which had been adduced to show that the testator intended to make another will, excluding the child whose birth (with the previous marriage) produced the revocation. Lord Alvanley, in *Gibbons v. Cautt*, 4 Ves. 848. said that he believed they went the length of admitting the evidence, but he did not like it. In *Kenebel v. Scrafton*, 5 Ves. 663. parol evidence of an intention not to revoke was offered; but Lord Rosslyn, on sending the case to the Court of King’s Bench, observed, “that the parol evidence did not weigh at all, being only conversations, and not amounting to a republication: a court of law would pay no regard to it. But the judges of that Court studiously avoided determining the question of its admissibility; nor was it necessary to do so, as they held the change of circumstances not to revoke on account of the provisions for the wife and children; *Kenebel v. Scrafton*, 2 East, 530. It is to be observed, that the cases in the ecclesiastical courts, where such evidence is unquestionably received, afford but little aid to such an attempt; for, as those courts are not fettered by the statute of frauds, in regard to the revocation and republication of wills, evidence is admitted, in a great variety of cases, to enable the Court, in granting probate, to determine which is the last will of the deceased that the statutes exclude in regard to real estate; 1 Phill. 471; 2 Adams, 455; 1 Powell, by Jarman, 452. n.

child as evidence of a revocation, that, as by every sort of evidence, even parol evidence; and there was no case in which a marriage and the birth of a child had been held to raise an implied revocation where there had not been a disposition of the whole estate.

3d. *Subsequent conveyance, or change of estate.*†

(a) *General doctrine.*‡

(b) *What conveyance, or change, has that effect.*§

1. *GOODTITLE, D. HOLFORD, v. OTWAY.* M. T. 1796. C. P. 1 B. & P. 576; S. C. Judgment affirmed. M. T. 1797. K. B. 7 T. R. 399. S. P. *DISTER v. DISTER.* E. T. 1683. C. P. 3 Lev. 108 S. P. *RISLEY v. BALTINGLASS.* E. T. 1676. K. B. T. Ramm. 240.

[357]
these facts only afford a presumption, they may be rebutted by other circumstances.*

Whenever a person who has devised an estate afterwards makes any alteration in it, by any mode of conveyance whatever, inconsistent

A., seised in fee of the manors of Stamford, &c., and also of the manors of Swimford and South Kilworth, entered into marriage articles to secure a jointure to his intended wife upon the above estates, and to make provision for younger children, and agreed to settle the Stamford estate upon his eldest son in strict settlement subject to part of such jointure and provision. He then devised those estates, in case he should happen to die without issue, and subject to such jointure as he might make to the lessors of the plaintiff for 500 years, upon certain trusts, in the devise expressed. Afterwards, by separate deeds of lease and release, he conveyed, first, the Stamford estate to trustees in fee, to the use of himself in fee, till the marriage, with divers limitations, in pursuance of the articles, and subject to the term of 500 years, for securing part of his wife's jointure; remainder to himself in fee. Secondly, The Swimford and South Kilworth estate to trustees in fee, to the use of himself in fee, till the marriage, to the use and intent, that his intended wife should take the

* See also *Jackson v. Harlock.* 2 Ed. 263. where Lord Northington states as a reason, and probably the true one, why marriage is not a revocation in respect of real estates, that the law settles dower as a provision out of it upon the wife, which the husband has no control over. At this day, however, limitations which exclude dower are so generally introduced into conveyances, that it has ceased, in fact, to be a general provision for married women; but this of course, does not affect the rules which were originally founded on that doctrine.

† The principle which governs in cases of an actual alteration in the estate of the deviser, is clearly distinguishable from that which governs in cases of an intended alteration only; for in the former cases, the revocation is a consequence of law uninfluenced by, and independent of, any interest in the deviser to revoke or not; but in the latter cases, the revocation is an inference from the fact as furnishing a ground to conclude that such was the intent of the party. It will be necessary for us therefore, if we wish to have a clear conception of this part of our subject, closely to attend to this distinction, as we shall find several nice and important consequences depending thereupon. There is no feature in our law more prominent than that of an uniform solicitude on every occasion to favour the heir, and prevent his disinherison: this anxious attention to the interests of the lawful representative has introduced into our law respecting devises this fixed principle; namely, that as at the time of the inception of his will, a man must be seised of the estate he devises; so the law requires that such estate should remain in lieu unaltered, and uninterrupted to the time of its consummation by his death; see judgment of Lord Chief Justice Trevor; *Fitzg.* 240; and Lord Mansfield, in *Rose v. Griffith*; 4 Burr. 1960; and 1 Powell, on Dev. ch. xiii.

‡ It was established as a rule of law, long before the statute of wills, that any alteration in the estate in lands devised, by the act of the deviser, after the publication of his will, operated as an implied revocation of such will. This doctrine is founded on three reasons; 1st, On the favour which the common law shows in every instance to the heir. 2d. On the principle, that a deviser must not only be actually seised of the lands at the time when he makes his will, but must so continue to be so seised thereof till the time of his death. 3d. Because any alteration of the estate devised is held to be evidence of an alteration in the intention of the deviser; 6 Cru. Dig. 99.

§ Although the act done by the testator, and which alters his estate, be that which he has directed in his will to be done, yet it will, in law, be a revocation of the will. Thus, where M. made her will, and thereby devised a messuage in L. to her sister for life, and after her decease, to trustees to sell the same, and to apply 200*l.* part of the produce thereof to A. and other parts to other persons, and gave the residue to C. After the making the will, the testatrix sold the estate for 2,500*l.*, part of which was left on mortgage of the estate, and the remainder laid out in the purchase of stock. And the question was, whether this sale was a revocation of the will in respect of the produce. And it was held that it was; for there was an absolute disposition inconsistent with it; 1 Bro. C. C. 401.

other part of her jointure thereout, if she survived him; and, after his death, remainder to trustees for 500 years, to secure such jointure; remainder to himself in fee. He afterwards married and died without issue.

The Court Eyre, C. J., *dissent.* held, that the will was revoked as to both estates by the deeds of settlement, though they were consistent with the provisions of the will, and though the deviser took back the estate he parted with by the same instrument; and were also of opinion that the latter estate was not expected from this revocation by the circumstance of the conveyance of that estate to the trustees being merely for the purpose of creating a term to secure the wife's jointure. They lamented the circumstance that it should, in some cases, be very contrary to the intent of a testator that his will should be annulled by such a conveyance, and that it often bore hard upon individuals that the rule of law should be strictly adhered to. But, while the rule of law existed, they said that they must adhere to it. And, observed they, it is not so barren of vindication as may at first sight appear. 1st. It is in favour of the heir at law, who is always an object of judicial favour; and it results necessarily from the technical operation of a legal conveyance. A will is a conveyance to the prejudice of the heir at law. If the law took its ordinary course he would inherit the seisin of his ancestor. If the ancestor, being seised under his will, and afterwards changes his seisin, it follows by technical consequence that the old seisin is at an end, and that the new seisin descends to the heir, without being affected by the prior will. 2ndly. It is ancient, and as much a part of our legal system, as to landed property, as the rules which exclude the father from the inheritance of his son, and the half-blood from inheriting at all. 3rdly. It cannot operate upon one who is *inops consilii*, or who has no opportunity of being a devisee; for, if a man is sufficiently strong in mind and body, and well enough assisted to execute a solemn deed, which passes away his legal fee simple, he merely may, if he will pay attention to it, republish his will. 4thly. It is a plain, simple, and perfectly intelligible rule, and amounts to no more than this, that, after a man has made his will, if he execute a conveyance of the legal fee-simple of the lands he has devised, he must republish his will, or it cannot take effect. If, so plain a rule to direct them, the parties omit to republish, the disappointment of the devisees is surely not to be imputed so much to the right of the rule as to the neglect of the parties, who either take no advice, or apply to such persons only as are unable to advise them properly. See Fitzg. 240; 3 Atk. 803; 4 Burr. 1960; Fitzg. Ab. tit. Devise, pl. 16; Bro. Abr. tit. Devise, pl. 8; 1 Roll. Ab. 615. and pl. 1; Cro. Car. 24; Eq. Ca. Abr. 411, Show. P. C. 154; S. C. 20; S. C. Freem. 2; 2 Ves. jun. 433; 1 Vin. Abr. tit. Devise (R. 6.) pl. 30; 3 Wils. 6; 4 T. R. 39; 2 Ld. Raym. 1150; 1 Ves. 174; Sir T. Raym. 240; Ambl. 117; Salk. 590.

2. DOE, D. DILNOT, v. DILNOT. E. T. 1817. C. P. 2 N. R. 401.

A testator, after having made his will, levied a fine to such uses as he should by deed or will appoint. He died without making any new will.

The Court, on the authority of Lord Lincoln's case, 1 Eq. Ca. Abr. 411; Show. P. C. 154; 2 Freem. 202; and Goodtitle, d. Holford, v. Otway, 1 B. & P. 576. held that the will, made prior to the fine, was revoked thereby.

3. SHOVE v. PINCKE. H. T. 1793 K. B. 5 T. R. 124.

It was certified to the Court of Chancery, in this case, that a deed, intended to operate as an appointment to uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention.

* With respect to leasehold estates, it has been long settled that a surrender of a lease want of for lives and the taking a new lease will operate as a revocation of a prior devise of it. some for For the testator, by the surrender, divests himself of his whole estate in the old lease, and mality in by the renewal acquires a new estate; 3 P. Wms. 163; 2 Atk. 597; 2 Atk. 430. 593; 2 the instru Ves. 518; 1 Bro. Ch. 261; 3 Atk. 174. If, however, the words of the will show the tes- ment, has tator's intention to dispose of all terms for years, whereof he may die possessed, a renewed been held term will pass; for a term of years being only a chattel, there is no necessity for a posses- to operate sion at the time when a will of it is made, or of a continuance of such possession till the testator's death; 2 Atk. 190; 16 Ves. 197; 11 Ves. 389; 3 Bro. P. C. 365.

ent with the preceding devise, or by which the estate devised becomes in any respect different from what it was before, such an alienation will operate as a revocation of the prior devise.*

[359]

A devise was there fore, hel den revoked by the levying of a fine to such uses as he should by will appoint. And even an intended alienation, which fails of taking effect for

as a revoca-
tion of the
devise.

A recovery,
though de-
fective, was
accordingly
held to
revoke the
will.*

And it has
been hold-
en, that
[36]
an aliena-
tion made
for the pur-
pose of giv-
ing effect to
a previous
devise, re-
vokes the
will on ac-
count of the
interrup-
tion of the
seisin.†

But though
a mere al-
teration of
the quality
of an es-
tate; (1
Roll. Abr.
616. pl. 3);
or the mere
change of a
trustee;

Or the par-
tition of an
estate be-
tween ten-
ants in com-
mon; will
not operate
as a revo-
cation of
the prece-
ding de-
vise.‡

4. DOE, D. LUSHINGTON, V. THE BISHOP OF LLANDAFF. T. T. 1807. C. P. 2 N. R. 491.

A testator having devised his lands, suffered a recovery thereof, in which, as well in the deeds to make a tenant to the *præcipe*, the tenant was called Edward, his real name being Edmund. In ejectment by the heir at law against the devisees, held that the recovery was good by estoppel against the testator, and all persons claiming under him, and that the will therefore was revoked thereby.

5. DARLEY V. LANGWORTHY. T. T. 1767. C. P. 3 Wils. 6. S. P. DISTER V. DISTER. 3 Lev. 108.

Vincent Darley being seised of several real estates for his life, with the reversion in fee in himself, made his will, by which he devised them to Mr. Langworthy in strict settlement. Some years after, the testator suffered a common recovery of the estates devised, to the use of himself in fee. The question was, whether the will was revoked by the recovery. The Court of Chancery ordered a case to be stated for the opinion of the Court of Common Pleas upon the following question, "Whether the deed executed, and the recovery suffered by Vincent Darley, was a revocation of the will." The case having been fully argued before that Court, Lord C. J. Wilmot said, there were a great many determinations touching the revocation of wills, and very nice artificial distinctions were made in favour of heirs at law. It seemed to be clear, from the latest determinations upon the subject, that if a man seised in fee, made his will and devised; and afterwards conveyed by recovery, fine, scoffment, release, &c. and took back the same, or a different estate, it should amount to a revocation. The reason was, that it must be presumed he intended to alter his will. The Court certified their opinion, that the deeds executed and the recovery suffered by Vincent Darley were a revocation of his will.

6. WATTS V. FULLARTON, cited, 2 Doug. 718 S. P. DOE V. POTT. Id. 709.

W. Watts devised all his real estates to trustees upon certain trusts; he afterwards made a codicil, reciting that, since the publication of his will, he had contracted for the purchase of certain lands; and thereby directed the trustees and executors named in his will to pay the purchase money; and that the said purchased premises should be conveyed to the same uses as he had declared concerning his other estates. Afterwards the testator himself completed the purchase, and took a conveyance of the estates to trustees, in trust for himself and his heirs. The question was, whether the conveyance of the newly purchased lands to the trustee, subsequent to the codicil, was not a revocation; the testator, at the time of making the codicil, having only a trust estate, and the vender being a trustee for him; so that, before his death, the legal estate was conveyed to other trustees. Lord Bathurst decreed there was no revocation; relying much on the general proposition laid down by Lord Hardwicke in *Parson v. Freeman*.

7. RISLEY V. BALTINGLASS. E. T. 1676. K. B. T. Raym. 240.

One Temple and two others were tenants in common. Temple made his will in writing of his third part; afterwards, by indenture and fine, a partition was made between the tenant, in common; and, if this partition was a revocation of the will was the question.

* So, Lord Eldon, in *Vawson v. Jeffrey*, 2 Swant. 274. suggested whether, if the testator had attempted to convey his copyhold estate in the same manner as he had conveyed his freehold estate, (i. e. by deed, and not by surrender) that would not have afforded evidence of his intention, however incomplete the conveyance might be. On the other hand, it has been lately decided in the Court of Common Pleas, that a deed void under the statute of mortmain, on account of the death of the grantor, within twelve months after its execution, is not a revocation of a prior devise; *Matthews v. Venables*. 2 Bing. 136.

† A devise in strict settlement. He afterwards makes a new contract, and then by his codicil passes the estates purchased under that contract to the same uses. After this, he unites the equitable estate, which he had before by trustees to his use, to the legal estate, by making an absolute purchase to himself in fee. This is not such a change of estate as will operate as a revocation; *Jenkinson v. Watts*, Loft. 609.

‡ It has been decided, that a surrender of a copyhold to particular limitations, with rever-

8. TICKNER v. TICKNER, cited 1 Wils. 303.

R. and H., being seised as co-heirs in gavelkind, R. made his will, and devised his lands; afterwards, a deed of partition was executed between R. and H., and the lands in question were allotted to R., and it was covenanted therein, that they and their wives should all join in levying a fine (which was done) and that the same, as to those lands, should enure to the use of R., and such uses as he should, by deed or will, appoint; and in default of appointment, to him in fee. Lord C. J. Lee held this to be clearly a revocation of the will, and not like the case of a bare partition only, unattended by a fine or conveyance to a new use, which would not have been a revocation.

9. WRIGHT v. LITTLER. M. T. 1761. K. B. 3 Burr. 1244; 1 Bl. Rep. 345.

This was an ejectment for certain copyhold lands within the manor of Barnes, in the county of Surrey, in which manor there is a custom of borough English. The lessor of the plaintiff, William Clymer, made out his title, under a regular and undisputed will of his grandfather John Clymer, dated 17th February, 1743, and executed in the presence of three witnesses, disposing of his freehold as well as of his copyhold estate to the lessor of the plaintiff in fee; the testator, John Clymer, having previously surrendered the copyhold to the use of his will. The title of the defendants (who were purchasers under another William Clymer, second and youngest son of John, and uncle to William, the lessor of the plaintiff,) depended upon another subsequent will (or instrument which they called a will) made by the said John, as they alleged, on the 20th of September, 1745, which they contended was at least a revocation of his former will in 1743. And, if it only be a revocation of the former will, then William, the youngest son of John, must inherit as heir in borough-English. This will or instrument of 1745 (which was not under seal) was all written by one William Medlicott, who was son-in-law to the said John Clymer (having married his only daughter Amy). It was indorsed on the back, in the same hand-writing of the same Wm. Medlicott in these words:—"The covenant and agreement of John Clymer;" and it was witnessed by the same Wm. Medlicott, and one Elizabeth Mitchell. The body of it was in these words:—"Know all men, by these presents, that I, John Clymer of Barnes, in the county of Surrey, Gent., have this day covenanted and agreed, in the manner and form following: that is to say, for natural love and affection to the surrenderor in fee, will not affect a prior surrender to the use of the will; *ante vol. vi. p. 399.* And even if the new surrender to the surrenderor in fee be after the will, as well as the surrender to the use of the will, the devise remains unrevoked; *Vawser v. Jeffrey, 3 B. & A. 462.* A contrary opinion had been expressed by Sir W. Grant before the case was sent to the Court of King's Bench; *S. C. in equity, 16 Ves. 526.* It is clear too, that a devise by a copyholder is not affected by his being subsequently admitted under a prior surrender, limiting the reversion to himself in fee; *Roe v. Griffiths, 4 Burr. 1952, S. C. 1 Blackst. 605.*

In *Haws v. Wyatt, 2 Cox, 263.* Sir R. P. Arden, M. R., held that a deed, which had been obtained by an undue exercise of the parental authority, and which the Court, on that account, ordered to be delivered up, did not revoke an antecedent devise, taking this distinction, "that if the deed were obtained from the devisor by duress, or by substituting another instrument different from that which he supposed he was signing, so that he did not exercise any intention upon the subject at the time, that would be a mere nullity; but, in the present case, the son certainly did mean to make the conveyance at the time he set his hand to the instrument." Lord Thurlow, however, on appeal, reversed this decree, his lordship considering, that by ordering the deed to be delivered up, he declared it to be no deed, and it could not, therefore, be a revocation; *Haws v. Wyatt, 8 B. C. C. 156.* Lord Eldon, in *Attorney-General v. Vigor, 8 Ves. 283.* observed, that the cases of *Hick v. Mors, Amb. 215,* and *Haws v. Wyatt,* were contradictory, and that until *Haws v. Wyatt* he had considered that there was a difference between deeds void at law and in equity; and his lordship observed, that if that case were right, "it must be supported upon this principle, if any, that where a man is induced by fraud, this Court considers him as having no will. He is compelled by fraud, as much as partition (which it will be recollected is not a revocation even at law) is compelled by the writ." Lord Alvanley, in *ex parte Earl of Ilchester, (7 Ves. 374.)* alluded to the case of *Haws v. Wyatt,* in terms which indicated that he had not surrendered his opinion that the will was revoked, conceiving himself to have Lord Hardwicke on his side in *Hick v. Mors,* which case, he said, was not adverted to before Lord Thurlow.

which I have and bear to my son and daughter, and grandson, hereinafter named, I do make, constitute, and appoint the several estates and sums of money following, after the decease of myself and Amy my wife, to come to and be given to them. But, first of all, my estate called Barnes and Hopton, to my wife for her life; and, after her decease, all that eighteen pounds a year to my son Wm. Clymer for his life; and, after his decease, to Wm. Clymer, my grandson. And, as to all those copyhold messuages, lands, and tenements at Barnes, in the county of Surrey (which is the estate in question), to my daughter Amy, the wife of Wm. Medlicott, her heirs and assigns for ever, to take and hold the same after the immediate death of myself and said wife, and not before. Dated 20th Sept. 1755." John Clymer, witness; Elizabeth Mitchell, William Medlicott. It happened in fact, that this Amy Medlicott, daughter of John Clymer, and wife of this Wm. Medlicott, died before her father. Upon the death of old John Clymer, in 1746, his second son, Wm. Clymer, was admitted to this copyhold estate (the premises in question: as heir in borough English; the above-mentioned will of old John Clymer, in 1743, being then unknown to every body except the above named Wm. Medlicott, who had it in his possession, but secreted it. This William, youngest son of John, enjoyed the estate until 1751, and afterwards aliened it to one Mitchell, who was admitted in 1751, and afterwards sold it to one Penley; Penley was admitted, and afterwards sold part of it to Littler, one of the present defendants, who was admitted to that part; the other part descended to Penley's heir, who was admitted thereto, and then sold it to Pelham, another of the present defendants, who was also admitted in due manner. During the time of all these transactions, the lessor of the plaintiff was at first a minor, then at sea, always poor, and remained ignorant of the will in 1743, till the death of Wm. Medlicott, who produced it when dying, and directed it to be delivered to the lessor of the plaintiff. Wm. Medlicott died in May, 1757. He had the custody of both wills till a few weeks before his death; the latter will was found amongst his papers; the former was delivered by the said Wm. Medlicott to one Edwards, about three weeks before his death, and it was, about three months after, delivered to Wm. Clymer, the lessor of the plaintiff, who was then about two years under age, but proved it in 1751. After this discovery the lessor of the plaintiff did not bring this ejectment till after an acquiescence of 14 or 15 years from his uncle's first admission to it upon Old John's death; or at least, without the nephew's setting up any claim within that time during which his uncle William, or the purchasers under him, had been in quiet possession. At the trial, the lessor of the plaintiff produced and proved the will of 1743, under which he was devisee of this estate in fee. To encounter this evidence, the defendants produced this will or instrument of 1745; and both the witnesses to it (Elizabeth Mitchell and William Medlicott) being dead, they proved their hand-writings, and also the hand-writing of old John Clymer, in the common and ordinary form. Whereupon the plaintiff's counsel insisted, that this will, or instrument, was, in the first place, an absolute forgery; and, in the next place, that, in point of law, it could not operate as a revocation of the will in 1743.

Per Cur. This paper is no revocation. It is no will; and therefore cannot direct the uses of the surrender. It is no conveyance. It is no agreement with any body. It does not purport having been delivered to, or for the use of any body. There is no proof that it was out of the custody of John Clymer before his death. It ought not to have been out of his custody, because it is voluntary, and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying, "that he intended to make a will, or surrender to the use of his daughter in fee," and did neither. An intention to revoke by a future act which a man cannot be compelled to perform is no revocation till the act is done. All the cases are so, and the reason is evident.

(C) PARTIAL REVOCATIONS

1. **FAWSEY V. JEFFERY.** H. T. 1820. K. B. 3 B. & A. 462. S. P. **BRIDGE-WATER V. BOLTON.** T. F. 1733. K. B. 2 Ld. Raym. 968; S. C. 3 Salk. 315.

A testator having devised copyhold lands to A. for life, with different remainders over; and having surrendered them to the uses of his will. Afterwards, in contemplation of marriage, conveyed his estates to trustees, and their heirs, to secure a jointure to his intended wife, and subject to a term of 99 years for that purpose, to the use of himself in fee, and subsequently surrendered his copyhold lands to their uses. The Court certified to the Lord Chancellor that this did not amount to a total revocation of his will; but that the devisee took the copyhold land, subject to the charge created by the settlement. See 1 Eq. Ca. Ab. 411; S. C. Show. Parl. Ca. 154; 1 B. & P. 576; 7 T. R. 399; 2 Ves. jun. 604; 3 Bl. Rep. 1046; 1 Sid. 73; Dyer, 310. b; Cro. Eliz. 306; Cro. Jac. 49; 4 Burr. 1354.

2. **BECKETT V. HARDEN.** E. T. 1815. K. B. 4 M. & S. 1.

A. B. devised to F. D. all his plantations, lands, tenements, negroes, slaves, cattle, plantations, stock, utensils, and hereditaments in the Island of St. Kitts, to hold to C. D., his heirs, executors, &c. according to the nature and quality thereof, to the use that W. B. should have one clear annuity, or rent charge, of 150*l.* for his life, to be issuing out of said plantations, &c., and subject to and chargeable, as aforesaid, to the use of C. D., his heirs, executors, &c. according to the nature and quality of the premises. There was a codicil reciting the death of W. B., which devised the said annuity to trustees, in trust for M. G. for life, to be raised out of his said plantations and estates, and paid in same manner, and with like remedies as directed in favour of W. B. There was a second codicil, which revoked that part of the first in which the testator had given to M. G. 150*l.* yearly, and instead thereof he gave 20*l.* per annum to M. G. for life. There was a third codicil, by which the testator revoked that part of his will in which he devised to C. D. all his estate and property in St. Kitts, and declared the same void; and gave and bequeathed the said property to J. P. in fee. The Court held that the annuity given to M. G. by the first codicil was not revoked by the last codicil, nor reduced by the second codicil, the second codicil not being executed according to the statute of frauds. See 2 Atk. 272; Plowd. 523. 541; Cro. Eq. 721; 1 Ves. 187; 2 Vern. 495; 8 Vin. Ab. 140; Devise, R. 2 pl. 16; 1 Bro. P. C. 160; 1 B. & P. 476; 7 T. R. 399; 3 Ves. jun. 665; 12 Ves. 37.

IX. RELATIVE TO THE REPUBLICATION OF DEVISES.†

(A) MODES OF.

1st. *By re-execution of a will.*

HERBERT V. TURBALL. M. T. 1662. K. B. 1 Sid. 162; S. C. 1 Keb. 589.

A. B. having, under age, made a will of land duly executed according to the statute, he re-executed it after he came of age, with the circumstances required by the statute. The question now agitated was whether the will could be impeached.

Per Cur. The will is good; for, although originally void in consequence of testator's infancy, his subsequent act rendered it valid.

* Erasing the name of a joint devisee, without any republication, is only a revocation *pro tanto*; Larkins, v. Larkins, 3 B. & P. 16. One having by will duly attested devised all his lands to trustees in trust to sell, &c., and, out of the interest of the monies, to pay an annuity, &c., afterwards obliterated, interlines, and alters all the bequests directed so to be paid, without attesting such alterations, &c. and without republishing his will, held that the devise to trustees to sell was not revoked; Sutton v. Sutton, Cowp. 812.

† devise being ambulatory during the life of the testator, if not actually obliterated and destroyed, may, although it has been revoked, be revived any time during his life by republication. And as, previously to the statute of frauds and perjuries, parol declarations were sufficient to revoke, so were they also sufficient to republish a devise, as they still are in regard to copyholds and personal estate; 1 Rolle's Abr. 618, pl. 6. 7; Cro. Eliz. 493; Gouldb. 150. But in order to produce republication, the expressions must be used with an intention to republish; 2 Atk. 599.

‡ And it may be observed, that there is no republication in equity, that is not so in law.

A will may also be republished by the testator's repeating, respecting the instrument, the ceremonies required by the statute of frauds, to attest the publication of wills.‡

[365]

A codicil, duly executed, whether actually annexed to, or expressly confirmed by the will or not, will operate as a republication of a will of lands, such will itself being duly executed.*

Unless a negative intention to republish be disclosed by the codicil.

But where, after a devise to A. and her heirs; and, in default of such issue, over, A. died in the testator's lifetime, who by codicil confirmed

2dly. *By codicil.*

1. *DOE, D. PATE, v. DAVY. M. T. 1775. K. B. Cowp. 158.*

D. by will, in 1767, after giving several legacies, made a general residuary devise. The testator then purchased some customary estates, and afterwards surrendered them to such uses as he should, by his last will in writing, direct. He then made a codicil, by which, after altering the devise of his freehold rents, he confirmed the devises in his said will, except what he had thereby altered, and desired that that writing might be accepted and taken as a codicil thereto. And the question was, whether the execution of the codicil subsequently to the purchase and surrender of the copyhold estates, amounted to such a republication of the will as to pass them; and it was held, upon the authority of *Acherley* and *Vernon*, that it did.

2. *PARKER v. BISCOE. H. T. 1819. C. P. 8 Taunt. 699; S. C. 2 Moore, 24. S. P. BOWES v. BOWES. 7 T. R. 432; S. C. 2 B. & P. 500.*

A testator, having, by his will, devised his real estate, and subsequently acquired other lands by descent; but supposing them to have passed to him and his sons, in strict settlement, by the will of the last owner, (which, however, turned out to have been revoked by a recovery) he, by a codicil, altered certain limitations in his will, for the express purpose of preventing the union of his own estates with the estate supposed to be devised. The Court concurred in the argument, that the language of the codicil negated the application of the devise in the will to the property in question.

3. *DOE, D. TURNER, v. KEET. E. T. 1792. K. B. 4 T. R. 601.*

The testator devised to B. and the heirs of her body; and for default of such issue, then over. After the making of the will, B. married, and died in the life-time of the testator, leaving a son. The testator knew of the birth of the son and the death of his mother immediately after these events happened.—

After her death the testator made a codicil, duly executed, by which after appointing a new executor of his will, and giving him a small legacy, he declared

* And the effect of such republication is to extend to lands acquired by the testator in the interval between execution of such will and codicil, any devise in the will sufficiently general in its terms to embrace them. Such a codicil too, it is clear, will republish a devise of particular lands, which has been revoked by an interruption in the testator's estate. Thus, in *Jackson v. Harlock, 5 T. R. 53*, where a man made a will devising certain lands, which devise was afterwards revoked by a settlement containing a new limitation of the fee to the testator, the devise was held to be republished by a codicil subsequently executed, attested by three witnesses, though it merely contained a disposition of personal estate, with the imposition of a forfeiture on the devisees or legatees of his will, who should do certain acts. The principle is not confined to such instances, but applies equally to cases where the codicil itself contains devises of land requiring such attestation. Thus, where a testator, having, by a will duly attested, devised all his lands, subsequently purchased a freehold estate, and then by a codicil attested by three witnesses devised certain real property, but not including the estate in question, the Court of K. B. held that the will, being republished by the codicil, included that estate; and the learned Judges, who delivered their opinions seriatim, treated it as a point quite settled; *Goodtitle, d. Woodhouse, v. Meredith, 2 M. & S. 5*. And where the testator by the codicil expressly devises part of his after-purchased estates, such devise will not exclude from the operation of a general devise in the will the other lands so purchased; *Coppin v. Fernyhough, 2 B. C. C. 91; Hulme v. Heygate, 1 Mer. 285*. Indeed, upon the principle that republication makes the will speak from the period of the execution of the codicil, it is clear that the specification of particular after-acquired lands could no more prevent the devise from operating upon the rest, than particular devises could negative the operation of the residuary devise in the will itself. Sir W. Grant, in *Hulme v. Heygate*, expressly laid it down, that it was not incumbent on the devisees to show the testator's intention to include, this estate in the general operation of the codicil, but on the heir at law to point out his positive intention to exclude it from that general operation. Another decision of this judge presents the ex remo point to which the doctrine of republication by codicil has been carried; for he held, that a codicil specifically devising certain lands had the effect of republishing the will, so as to subject those lands to a general charge contained in the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E.; and having subsequently purchased several copyhold estates, by a codicil attested by three witnesses, devised them to his son in fee. Sir Wm. Grant held, that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts; *Rowley v. Eyton, 2 Mer. 128*. Query. Whether the principle would have applied, if the devisee in the codicil had not been the same person as the residuary devisee in the will; 1 *Powell, by Jarman, p. 611, 13, 14, notis.*

that his will and that codicil which he willed should be added to and deemed part thereof, should contain his last will and testament. It was contended for the son of B. that notwithstanding, under the terms of the devise, he could claim only by descent from his mother; yet as the deviser was apprised of her death when he made the codicil, that might operate as a republication of the will, so as to make a devise to the heirs of B., she herself being then dead. But the Court were clearly of opinion, that it was a lapsed devise; since a republication can have no other effect than to make the will stand as if it were made at the time; and then the devise purported to be of an estate tail to a dead person, which was clearly void.

3rdly. *By cancelling a revocation.*

GOODRIGHT, D. GLAZIER, V. GLAZIER. H. T. 1770. K. B. 4 Burr. 2. 1512.

S. P. HARWOOD, D. GOODRIGHT, V. ROLFE. Cowp. 92; S. C. Lofft. 575.

A person made a will in 1757, and another in 1763. The former was never cancelled by the testator himself. Both were in the testator's custody at the time of his death; the second cancelled, the first uncanceled. The counsel for the heir at law contended that the second will revoked the first, and being afterwards cancelled, the testator had died intestate; and cited the case of *ex parte Hillier*, 3 Atk. 708; where Sir George Lee determined that the execution of a second will was a revocation of a first, although the second was afterwards cancelled; and that the cancelling the second did not set up the first: which was the same point, only that it was personal property. Lord Mansfield said, that with regard to the case, *ex parte Hillier*, 3 Atk. 798, Mr. Atkyns only reported what passed in Chancery; there might be other circumstances appearing to the Ecclesiastical Court, which might amount to a revocation of a will of personal estate. Here the intention of the testator was plain and clear. A will was ambulatory till the death of the testator. If the testator let it stand till he died, it was his will; if he did not suffer it to do so, it was not his will; here he had two; he had cancelled the second: it had no effect; no operation; it was as no will at all, being cancelled before his death; but the former which was never cancelled, stood as his will. Mr. Justice Yates said a will had no operation till the death of the testator. The second will never operated, it was only intentional; the testator changed his intention and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable, and he had revoked it.

4thly. *By surrender to the use of a will.*

1. HEYLYN V. HEYLYN, T. T. 1774. K. B. Cowp. 130.

A person having made his will, and devised all his freehold and copyhold estates to several uses, afterwards purchased other copyhold lands, which he surrendered thus. "To the uses declared or to be declared in, and by his last will and testament. The Court of Chancery directed a case to be sent to the Court of King's Bench whether the after-purchased copyholds passed by the will. Lord Mansfield said; that when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the time of the date of the republication, just the same as if he had such additional property at the time of making his will. Therefore, if one devises lands by the name of B. C. and D., and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, B. C. and D. But if the testator in his will, says: "I give all my real estate;" a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderor may express himself so as to make it relate to a will actually made, and that the copyhold lands so surrendered will pass by it. Suppose a testator seised of copyhold lands makes his will without a surrender; if he afterwards surrenders them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them; because, it only obviates the mode and form of conveyance. What has the testator done here? Having made his will, and declared his lands to uses, he surrenders

his newly-purchased copyholds to the uses, intents, and purposes declared, or to be declared in his will. It is precisely the same thing as if he had said: "And whereas, I have made a will so and so, and devised all my lands to J. S., to such and such uses, I mean these newly purchased lands should pass to the same uses." The Court certified that the surrender did, by express reference to the uses declared by the will, adopt and apply the words of the will to the copyhold lands, as if the testator had been seised thereof at the time of making the said will, and therefore they were subject to the same uses, to which all the testator's copyhold lands were devised.

2. *BURTONSHAW V GILBERT* E. T. 1774. K. B. Cowp. 49.

But a will, once cancelled, must be re-executed.

A B. having made his will, and a duplicate thereof, delivered the duplicate to A. He afterwards made another will, revoking all former wills, and at the same time cancelled that part of the former will in his possession. Before his death, he sent for an attorney to make a third will, but was insensible when he arrived. After his death the first and the second will were found together, in a paper, both cancelled, but the duplicate of the first was found uncanceled among his other deeds and papers. The act of cancelling the latter will did not set up the duplicate of the former.

5thly. *In consequence of a conditional revocation not taking effect.**

(1) EFFECT OF REPUBLICATION.

LANE V. WILKINS. M. T. 1808. K. B. 10 East, 241.

The republication of a will only gives the same effect to words used in the original will, as they would have had, had such original will remained all along unaffected.†

A testator being devisee in tail of certain lands, in allusion to them, said: "which, though I could now legally dispose of, I mean fully to confirm to" the devisees in remainder. He afterwards executed a common recovery of the lands, declaring the uses to himself for life; remainder to such afterwards as he by deed, will, or codicil, should appoint. He then executed a codicil, whereby he expressly confirmed the will; and it was contended that the effect of the whole was to pass the estates in question to the remainder-men. But the Court held, that the will contained no devise, the expressions rather inferring an intention to leave the property alone, than to dispose of it; and that the codicil could not alter the construction. See 2 H. Bl. 40; 5 T. R. 177; 2 Burr 1131; 1 Rep. 93; 2 Bro. Ch. R. 303, Com. Rep. 381; Cowp. 158; 4 Bro Ch Ca. 2; 1 Ves. jun. 486; 7 id. 98. 118—120; Ambl. 97; 7 T. R. 487; Salk. 225.

* A. declares his will void, unless he returns from Ireland; held, that it was not revived by his return, but required a positive republication to set it up. So when a feme sole makes her will and marries, the act of marriage merges her will, and it does not revive by the death of her husband without republication; *Lofft*, 667.

† It is to be observed, that the effect of a new publication is that all which the words in the will embraced at the time when the new publication is made, shall pass thereby; or, to put it more clearly, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property the testator is seised of, and the persons named therein at the date of the republication, just the same as if he had had such additional property, or such persons had been in esse, at the time of making his will; the conclusion from that fact being, that the testator so intended. The next consideration, therefore, upon a will so republished, is what the words of the will at the time of republication import; for they will operate to their full extent at that time, just the same as if the testator had then made a new will; and, therefore, it was held, in *Beckford and Parne-cott's case*, Cro. Eliz. 493., that the words in the will being "All the testator's lands in A.," and the newly purchased lands lying in A., they were apt enough, and sufficient to carry them; the will having been republished; nor could more apt words have been added thereto, had a new one been made. Upon the same principle it has been held that, by a republication, a person not in existence at the time of making a will, may be made capable of taking thereby, if he be well described therein; 1 P. Wms. 225. But it has been seen (*Lane v. Wilkinson*, 10 East, 241.) that the effect of such a republication extends no farther than to give words used in the original will the same force and effect as they would have had, if first written at the time of the republication; consequently, if one devise lands by the name of B. C. and D., and then purchase new lands, and republish his will, the republication does not bring such new lands within the will, because it speaks only of the particular lands B. C. and D. And it is clear, that the republication of a will will not make words of limitation, applied to a devisee, who had, since the making of the will, died, and the devise to whom had therefore lapsed, operate as words of purchase; *Prec. in Ch.* 439. And, as a codicil does not, in republishing, give any new quality to a will, its operation being merely to extend the expression used therein to the time of republication; a devise, not properly execu-

X. RELATIVE TO THE AVOIDANCE OF A DEVISE.

(A) AB INITIO.

1st. In consequence of the party's incapacity.

1. As to the testator.*

2. As to the devise, *vide ante*, p. 98, &c.

2dly. In consequence of the nature of the property, *vide ante*, p. 106, &c.

3dly. In consequence of the limitations in the will being too remote as to vesting.

SOMERVILLE v. LETHBRIDGE. H. T. 1795. K. B. 6 T. R. 213. S. P.

SCATTERGOOD v. EDGE. E. T. 1699. K. B. 12 Mod. 283; S. C. J. Salk. 1229.

Devise of testator's residuary estates and lands to trustees in trust, to preserve contingent remainders, and as to certain parts in trust for A. an infant, and unmarried, for ninety-nine years, if he should live so long, and after that term to his first, second, third, and other sons, and the issues male of their bodies lawfully begotten, for the like term of ninety-nine years, as they should be in seniority of birth; and in default of such issue male, in him or them. then to B., and the issue male of his body, for the like term of ninety-nine years, and in the same manner to C. and D. and their issue male, for the like term; and for want of issue male of D., to testator's right heirs. The questions were: 1st. What estate A. took under the will? 2d. What estate the first son of A. will take under such will? 3d. Whether the third and fourth sons will take any and what estates? And, lastly, whether the subsequent limitations can ever take effect? *Per Cur.* A. takes an equitable estate for ninety-nine years, determinable with his life, and upon his death, his first son will take a like estate, but all the subsequent limitations are void.

4thly. In consequence of the uncertain mode in which the property is conveyed.†

1. DUB, D. HAYTER, v. JOINVILLE. M. T. 1802. K. B. 3 East, 1172. S. P.

SKERRATT v. OAKLEY. H. T. 1798. K. B. 7 T. R. 492; S. P. PITS v.

PELHAM. 1 Lev. 304.

A testator devised and bequeathed residuary, real and personal estate to his wife for life; and after her decease, one-half to his wife's "family," and the other half "to his brother and sister's family," share and share alike; it appeared that the testator's wife had one brother, who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, the Court held that both the devises were void, from the uncertainty in both cases, as to who was meant by the word "family;" and in the latter case, from the uncertainty whether it was to be applied, as well to the family of the dead as of the surviving sister: and also, whether it referred to the brother, which, however, the Court thought it did not.

ted at its inception, will not be helped by a codicil, although that be executed pursuant to the statute of frauds; (*Attorney-General v. Barnes, et al. Pro. Chas. 270; S. C. Vern. 597; 3 Rep. Chan. 21.*) But we must be careful to distinguish cases of the above nature, in which there is a will and a codicil, taking effect as distinct instruments, from the case of an entire instrument made and executed at several times, as to several distinct parts of the testator's property, but not attested until the whole is completed, the one act being evidently intended to apply to the whole; *Carlton v. Griffin, 1 Burr. 549; P. & W. on Dev. Ch. xiv.*

* A will made by the testator when not in a testable state, and not confirmed when he became testable, is a nullity; *Scammel v. Wilkinson, 2 East, 552; et vide ante, p. 98, &c.*

† So a devise may be void for repugnancy; *12 East, 515; 9 Ves. 566; 9 Ves. 672; 9 East, 495; 16 Ves. 27; Co. Litt. 112. b.; 2 Atk. 872; 2 Taunt. 109; Cro. Eliz. 9; 3 P. Wins. 111.*

‡ It is a rule universally adopted in the construction of wills, that, whenever there is an irreconcilable uncertainty or repugnancy in the disposition made by a testator of his real property, the title of the heir at law shall be preferred to all others; because, where a Court cannot find words in a will which, either expressly, or by necessary implication, denote the testator's intention beyond the possibility of a doubt, the rule of law directing descents, which are certain, must prevail, and cannot be superseded by an uncertain devise; *Powell on Dev. ch. ix.*

§ As in the absence of a certain degree of perspicuity, the rule to guide the Court, viz. the testator's intention, is wanting; *Skin. 633.*

[369]

Devise to trustees in fee, in trust for A. an infant, for ninety-nine years, if he should so long live; and after that term,

to his first, second, third, and other sons,

[370]

and the issue male of their bodies for the like term of ninety-nine years, as they should be in seniority of birth; held that the devise to the first unborn son of A.

was good, but the subsequent limitations were void.

When it is impossible to discover, from the words of a will, what is meant to be given, or to whom, the will is void for an certainty. §

2. *DOE, D. USHER, v. JESSEP.* E. T. 1810. K. B. 12 East, 288.

But the im-
possibility
must be an
absolute
one.

[371]

A testator devised to A. B. (a natural son then under age, and the heirs of his body, and "if he die before twenty-one, and without issue," then over to other relations, and ultimately to the testator's own right heirs; A. B. attained twenty-one. A codicil was made *after* the son attained twenty-one, by which the testator confirmed every part of his will, *so far as my affairs were consistent*. The question was, whether the limitation over took effect. It was contended that the limitation took effect upon the testator's son at any time, and that such contingency was not confined to the event of his death, under the age of twenty-one. The case of *Brownswood v. Edwards* (2 Ves. 243.) was relied on. The case was as follows: A testator devised to trustees and their heirs, to receive the rents, until J. B. should attain twenty-one, and if he should live to attain twenty-one, or have issue, then to the said J. B., and the heirs of his body; but if the said J. B. should die before twenty-one, *and* without issue, then in trust for S. B.; but if she should happen to die, &c. then to collateral relations. The devisees were the testator's illegitimate son and daughter. The son attained twenty-one, and died without issue, and Lord Hardwicke decreed the daughter nevertheless to be entitled; and his Lordship observed: "in a devise to one and his heirs, and if he should die before twenty-one, or without issue, then over, the Court has said, it was not the intent to disinherit the issue, and therefore *or* shall be construed *and*; but if the limitation had been in tail there would be no occasion to resort to that, but the Court would have made the construction I do now; viz. if he dies without issue, before twenty-one, then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder, because he had made his original devise capable of a proper remainder, in which case the Court will always construe it a remainder." It was also maintained that, even allowing such arguments to be insupportable, the codicil made after the son attained twenty-one placed the case beyond a shadow of doubt.

Set per Cur. This case is so far distinguishable from *Brownswood v. Edwards*, that the word *and* was construed *or*, to prevent the working of an injury to the issue; here *and* is required to be construed *or* in order to work the very injury, to avoid which, in other cases, the Courts have construed *or* to be *and*. Then reading it in the natural sense of the word, the son having attained twenty-one, the limitation over, which was to take effect if he died before twenty-one *and* without issue, was defeated. Then as to the codicil, the testator confirmed his will, *so far as his affairs were consistent with it*; that is, so far as his affairs remained in the same state as when he made his will; but the affairs were altered in the mean time in this respect, for the son had attained twenty-one, and therefore one of the events could no longer take place, upon the happening of which the limitation over was to take effect; the codicil, therefore, does not alter the construction we have put on the terms of the devise. See 1 *Ld. Raym.* 506; but see, *S. C.* 1 *Freem.* 409.

3. *ONGLEY v. PEALE.* M. T. 1712. K. B. 2 *Ld. Raym.* 1312. *S. P.* *EVANS, D. BROOK, v. ASTLEY.* M. T. 1765 K. B. 1 *Bl.* 499; *S. C.* 3 *Burr.* 521.

For, if it
can be in a
ny mode re-
duced to a
certainty,
[372]
the devise
is good.

A. B. seised in fee, of a house in Ludgate, devised the same "to S. and his brothers successively, for their lives," and then the testator, after mentioning another matter, went on and said, "And as for my house at Ludgate. I do not leave it to S., nor his brothers, afore to be entered on and enjoyed till one month after their marriages." S., at the time of making the will, had two brothers, R. and O.; S. was the eldest, R. the second, and O. the third; R. died in the life-time of S. and O., and the question was, whether this was a good devise, or void for uncertainty. And it was argued against the devise, first, that it was void for uncertainty, by reason of the word "successively" not showing which should take first and which second in succession; secondly, that the condition in relation to marriage made it more uncertain; for, till marriage none could take; and suppose the second brother had married, and nei-

ther of the other two, who must have taken? certainly none of them; for, if he that was married should take first, then that would overthrow the other construction of successive, that the eldest ought to take first, and then the second, and then the third. *See per totam curiam.* The will was good and certain enough; for, being in the case of brothers, the common law was a guide to the exposition of the word "successive," viz. that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the Court agreed, that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general. And therefore that, if the second son had married before the eldest, yet he could not have taken by this devise.

4. *REX V. THE LORD AND STEWARD OF THE MAYOR OF CHERTSEY.* T. T. 1806.

K. B. 3 Smith's Rep. 459.

Devise to A, for life; remainder to the lawful issue of her body, in such parts, shares, and proportions, in manner and form, as she by will should limit and appoint; and in default thereof, to all and every the children of A, and their heirs, as tenants in common, and not as joint tenants; and, in default of such issue, to the right heirs of the testator. The question was, what estate a child of A took. *Per Cur.* It has been said, in the course of the argument, that a power has only been granted in this case to appoint the shares and proportions amongst the children in tail. If so that would furnish an inference that the limitations to take place in default of appointment would be an estate tail; but we think this devise gives equally a power of appointment in fee. Under this power, the children might have an estate in fee given to them. Then how can we say that by the limitation appointed as a substitution of the power, the testator did not give as large an estate as under the power might have been given to the children or their heirs.

5. *PRIDE V. ATWICK.* E. T. 1664. K. B. 1 Keb. 692. S. P. *PRICE V.*

WARREN. Skin. 266.

I., seised in fee, devised all his freehold lands to his wife for five years, &c. and by codicil added, "that if any of his three sons, W., D. and J., died before the five years were out of the freehold, then to be equally divided between those of his sons that should be then living," and no mention of lands was made in the codicil. W. and D. died within five years; D. leaving his wife *en ventre* with a child. And the question between this child, who was heir at law to the testator, and J. the surviving brother, was, as to the application of the words in the codicil; whether they referred to the freehold, and gave it to the surviving brother, so as that he was to have the whole for life; or whether they referred to the five years' term, requiring the freehold to be divided upon the death of either of the sons within the five years. And it was argued that for want of the word "it," the latter clause could not relate to the lands given to his three sons, but must relate to the remainder of the five years in the freehold; viz. that so much thereof as should be unexpired, should be divided between the sons. But, on the other side, it was contended, first, that the word "it" must necessarily be intended, and must relate to the lands given to the three sons and not to the five years; because the lands were the last antecedent, and the five years, by a direct and positive clause, were given to the wife, and she was to pay some legacies out of it, and therefore it could not be the devisors intent to destroy her interest; secondly, that "to be divided among the sons," made them tenants in common, and not joint tenants. And, on the first argument, three judges were of this opinion; but Keeling, C. J. conceived the remainder to refer to the five years, and not to the lands given to the three sons, to be divided; *et adjournatur.* The case was then brought on again, and the Court inclined, that the lands devised for five years to the wife were to be divided between D. and J. as survivors; for on the devise "to be divided on the death of any of his sons, within five years," without saying what should be divided, it must be intended the lands were to be divided. The case was again adjourned, and then came on again for final discussion, when the Court, on different grounds, decided unanimously in favour of the

If however, the thing devised be clearly described, an error in [374] words of demonstration added, will not vitiate the devise.*

So, if the person of the devise be absolutely uncertain, the devise will be void.†

But where the devise was "to M., my brother, and to S., my brother's son," evidence was held

child of D., who was heir at law. But Keeling, C. J. and Hyde, J. were of opinion that the codicil was uncertain and derogatory, and so void.

6. *HASTEAD v. SEARLE*. 1 Ld. Raym. 728. *S. P. PARKER v. ATRES*. 3 Keb. 637.

The Court in this case held, that it is not essential to the validity of a devise, that all the particulars of which the description is composed should be accurate. It is sufficient, said they, if there is enough of accuracy to identify the subject.

7. *THOMAS v. THOMAS*. E. T. 1796. K. B. 6 T. R. 671. *S. P. DOE, D. HANSON, v. FYLDES*. T. T. 1778. K. B. Cowp. 837. *S. P. LISLE v. GRAY*. T. T. 1678. K. B. 2 Lev. 223; *S. C. Raym. 278*. *S. P. WEST v. MORRIS*. E. T. 1733. K. B. And. 201. *S. P. THE ATTORNEY GENERAL v. THE MAYOR, &C. OF THE ANCIENT TOWN OF RYE*. E. T. 1817. C. P. 7 Taunt. 446.

Devise to "my grand-daughter, E. E., of M. parish, forty pounds. Item, I give to my grand-daughter, M. T. of L. in M. parish, the reversion of the house in Water-street, the said house to continue in my wife's possession during her widowhood." At the time of his death, the deviser had a grand-daughter, named E. E. who lived at L. in M. parish, and a great-grand-daughter, M. T., an infant about two years old, who lived in another parish, some miles distant from M., where she had never been in her life. At the trial of the question whether either and which of these two, or the heirs at law were entitled, evidence was admitted by the judge, subject to the opinion of the Court that, when the will was read over by the attorney, testator said there was a mistake in the name of the woman to whom the house was given, but that on saying he would rectify it, he replied there was no occasion as the place of abode and parish would be sufficient. The jury, however, thought there was no such mistake, and a verdict was entered up, disposing of E. E.'s claim. They found a verdict for the heirs at law, on the ground of the uncertainty, with liberty for M. T. to enter a nonsuit, if the Court should think her entitled. But the Court discharged the rule, observing, upon the maxim *falsa demonstratio non nocet*, which had been used in M. T.'s favour, that it applies only to a superadded description, which, though inapt, does not place any other person in competition with the claimant, but in this case there were two parts of the description, viz. the degree of affinity and place of abode, which were not only inapplicable to M. T. but answered to another person, also an object of the testator's bounty. This reduced it to a conjecture; but an heir at law was not to be disinherited by conjecture.

8. *DOE, D. WESTLAKE, v. WESTLAKE*. M. T. 1802 K. B. 4 B. & A. 57.

A testator, by his will, devised to Matthew W., his brother, and Simon W. his brother's son, a certain estate. It appeared, that the testator had three brothers, each of whom had a son of the name of Simon, living at the time of

* Where, therefore, the property is described to be in the right parish, but in the wrong county: *Brown v. Langley*, 2 Eq. Ca. Abr. 416. pl. 14; *Langenaw, in Denhighshire, v. Bean Finch*, 395; *S. C. 8 Vin. Abr. 278*. pl. 16. Upon the same principle, a freehold estate has been held to pass under the description of leasehold, where the reference to its name and local situation left no doubt of its identity; *Doe, d. Wilkins, v. Kemeys*, 9 East, 366; and, vice versa, *Day v. Trigg*, 1 P. Wms. 286. So a devise of an estate in possession, in Worcester, has been held to carry a reversionary estate of the deviser, in that city, he having no other property there; *Houston v. Corbet*, 34 H. 6. p. 16. cited in *Howe v. Connye*, 1 Leon. 180. And, under the description of buildings in a given street, houses situate in a lane contiguous to it have been held to pass, for want of property more exactly answering to the description; *Doe, d. Humphreys, v. Roberts*, 5 B. & A. 407. And a devise of houses and lands lying in the parish of Billing, and in a street there called Brooks-street, has been held to be a good devise of lands in Billing-street, though there was no such parish; *Pacy v. Knolls, Browne*, 131; *S. C. 8 Vin. Abr. 277*. pl. 7.

† Thus (*Fitzb. Dov. 7. 49. E. 3; 2 Anders. 12.*), if one devise land to the two best men of the White Towers, this devise is void; for these are not persons known; and there is no certain intentment to be collected from the words of such devise. So, if a devise be to one of the sons of J. S., he having several sons; the devise is void for uncertainty, and cannot be made good; per *Tracey*, 2 Vern. 624, 625; *Sir T. Raym. 82*; per *Bridgm. C. J. And*, if a man devise to twenty of the poorest of his kindred, this is void, for the uncertainty who may be adjudged the poorest; *Webb's case*, 1 Rol. Abr. 609. (D)

the testator's death. The question was, whether the proof of this fact raised [375] such an ambiguity in the will as to let in parol evidence of declarations of the testator as to the person intended. *Per Cur.* The testator's declarations are inadmissible. They could only be admitted in case an ambiguity were raised in the will. But here we think that no such consequence has resulted from the proof of the fact which his declarations tend to substantiate. On the contrary, it is quite clear, that the testator could mean no one but Simon, the son of Matthew W.; as, in point of legal construction, when the testator is speaking of his brother's son, he must be taken to speak of the son of that brother who was then particularly on his mind. to be inadmissible to prove that S., a nephew not the son of M., was intended.

(B) BY MATTER EX POST FACTO.

1st. *In consequence of devisee's death.**

GOODRIGHT v. WRIGHT. 1 P. Wms. 397; S. C. 1 Str. 25. *S. P. BUSBY v. GREENSLATE.* T. T. 1722. K. B. 1 Str. 445. *S. P. HODGSON v. AMBROSE.* 1 Doug. 337.

A B. seised in fee, devised lands to A. and his issue; remainder to B. and his issue; remainder to the heirs of A. A. died without issue in the life-time of the testator, leaving issue the defendant, who was also the heir of A., and the plaintiff was the heir of the testator. The question was, whether, as the devisees A. and B., both died in the life-time of the testator, the issue of B., who was born after the will was made, and so could not take jointly with the devisees, could take either as heir of the body of B., or as the right heir of A. If the devisee die before the devisee be void.†

Parker, C. J. delivered the unanimous opinion of the Court, that this case was exactly within the reason of the case of *Brett v. Rigden*: first, because as well in this case the word "issue," as in that the word "heirs," was clearly used as a word of limitation; viz. to measure out the quantity of estate that the devisee was to take, and not as a word of purchase; the devisee only being in the view and consideration of the testator; and the words "heir," or "issue," mentioned for nothing else but to limit what estate the devisee should take.

* Originally, it might have been questionable whether the rule applicable to a devise in fee, that, by the devisee dying in the devisor's life-time, the bequest is lapsed (since "heirs" only denote the quantity of estate given; and, as every man claiming under a will claims as a purchaser, unless the ancestor takes it, his heir cannot), applies to estates-tail, where the issue claiming per formam doni, is part of the object of the devisor's bounty; the authorities, however, have placed them on the same footing: *Warren v. White*, 6 T. R. 520. Where land is devised to A. (whether heir or stranger) and the heirs of his body, and, for default of issue to A., then the estate to go over; if A. dies in the life-time of the testator, the bequest to him and his issue lapses; *White v. Warner*, 11 East, 551. n.; *Doe, ex d. Lord Lindsey, v. Colyear*, id. 543.

† Where a trust is sufficiently created, it will fasten itself upon the land, and will not become void by the incapacity or death of the trustee. In consequence of this principle, it was determined by Lord Camden that, where an estate was devised to trustees, upon trust for a charity, the death of the trustees in the life-time of the testator did not make that devise void; *Ambl. 571*. Lord Hardwicke has observed that, in the case of copyholds, though the land passes by the surrender, and the will is only directory of the uses; yet, if the devisee dies in the life-time of the devisor, the devise is void; 2 Ves. 77; 10 id. 503. Where a devise of lands in fee-simple becomes lapsed, by the death of the devisee, in the life-time of the testator, the estate devised will not go to the residuary devisee of the real estate, but will descend to the heir at law of the testator. A person devised his messuage, in E., to F. C. and his heirs; and all the rest and residue of his messuages, lands, and hereditaments, to J. L., his heirs, and assigns, for ever. F. C. died in the life-time of the testator, by which the devise to him lapsed; and the question was, whether the latter clause in the will would carry over the lapsed devise to the residuary devisee, or it would descend to the heir at law of the testator. The Court held, that the devise of all the rest and residue did not convey what was devised before; for wills must be construed from the intent of the testator at the time of making them, which appeared to be to give his whole estate to F. C. and his heirs, in the messuage of E.; and, at the time when the will was made, he had no residue left in that messuage; and the devise to F. C. being void, the messuage would descend to the heir; *Fortesc. 182*. In a subsequent case of the same kind, reported by Ld. C. J. Willes, (p. 293.) the following propositions were laid down: 1st. That the intent of the testator ought always to take place, when it is not contrary to the rules of law. 2nd. That the intent of the testator ought always to be taken as things stood at the time of making his will; and was not to be collected from subsequent accidents, which the testator could not foresee. 3rd. That, when a testator, in his will, had given away all his estate and interest in certain lands, so that, if he were to die immediately, nothing remained undisposed of,

| 376 |

2dly. *By waiver.**

| 377 |

Die.† See *tit. Coin and Coinage; Gaming.***Diem clausit extremum.** See *tit. Extent.***Dies and sabbatus.** See *tit. Holiday.***Digests.** See *tit. Copyright, ante, vol. vi. p. 553.***Dignities.** See *tit. Titles of Honour.***Dilatory.** See *tit. Sham Plea.***Dissolutions.** See *tit. Ecclesiastical Persons.***Diminution.** See *tit. Error, Writ of.***Dioecse.**‡

he could not intend to give any thing in those lands to his residuary devisee. And judgment was given accordingly.

* An express waiver is where the devisee actually refuses to accept the thing devised. The point was lately raised, whether a devisee could disclaim by deed. It was contended, on the authority of *Co. Litt. 111. a.; Shep. Touch. 185; Bro. Abr. tit. Joint-tenants. pl. 57;* and *Butler and Baker's case, 3 Rep. 26* that, where the fee is devise to one, the estate remains in the devisee till he has disclaimed in a court of record. But the Court held, that a renunciation by deed was sufficient; *Abbott, C. J.,* relied much on *Thomson v. Leach, 2 Vern. 198*, where three judges held that an estate did not pass by surrender to the surrenderee, until he had expressly accepted it. Mr. Justice Ventris differed, and held that it passed immediately, liable to be divested by the dissent of the surrenderee, as he must be taken to give an implied assent to that which is for his benefit, till the contrary appears; for, that "a man cannot have an estate put up unto him, in spite of his teeth;" *Townson v. Tickell, 3 B. & A. 31;* see *Nicholson v. Wordsworth, 2 Swanst. 375; Crewe v. Dicken, 4 Ves. 97.* An implied waiver is, where the devisee does an act, from whence it is inferred that he does not accept the benefit intended him under the will. It is a conclusion in equity, that, wherever any person, having a claim upon a man's estate independent of him, and also a claim thereupon under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived, or abandoned; for, it being against the intention of the will that the devisee should have both, equity, therefore, considers such devise to be upon an implied condition, that the devisee shall abandon his original title, or shall waive his title by devise; *2 Vern. 381.* And the rule equally applies, whether the benefit under the will be immediate or consequential; for, though the effect, in such cases, is that the devise operates as a satisfaction for the previous interest of the devisee, yet, the principles by which satisfactions, strictly speaking, are governed, do not apply to cases of this kind; therefore, it is not necessary that the thing given by devise should be of the same nature, or of adequate value, with the thing in lieu of which it is to be received; *1 Ves. sen. 238.* If the devisee be a creditor and not a volunteer, this rule does not apply; *2 P. Wms. 412.* But, where real estate is professed to be devised by a will, not executed so as to pass it, or which is in other respects invalid, and by the same will, a legacy is given to the heir, he may take the legacy without making good the devise; for from its defect of execution, it cannot be read as a will of real estate; and the Court does not see an intention to dispose of it, *1 Ves. sen. 298.* But if there be an express direction that a legatee, disputing the will, shall forfeit all benefit under it, the heir will be obliged to renounce the legacy, or confirm the invalid disposition; because, the direction will be considered as a condition annexed to the personal legacy; *2 Ves. sen. 12.* But if a man give a portion, or legacy, to a child, or other person, in lieu or satisfaction of a particular thing expressed, that shall not exclude him from another benefit, although the other benefit claimed be contrary to the will of the donor: for Courts will not construe that, as meant in lieu of every thing else, which a testator has said is to be in lieu of a particular thing; *2 Ves. sen. 30.* And where the testator has property of his own to answer the description given in his will of that which he means to dispose of thereby, his devise will be construed as applicable to his own property of that description, and not to the property of another, though equally answering it; *2 Atk. 103; Powell on Dev. ch. ix.*

† By 44 Geo. 3. c. 98. for every pair of die which shall be made fit for sale or use in Great Britain, a duty of 1*l.* is imposed; and by 6 Geo. 1. c. 21. if the commissioners be informed, or have cause to suspect, that any person makes die in a place not entered, on affidavit thereof by the informer before a justice of the peace, declaring the grounds of his suspicions, their officer may in the day time, and in the presence of a constable, or other lawful officer of the peace, by warrant of such justice, break open the door or any part of such private place, and enter and seize all such die, tools or materials, and if not replevied in five days by the true owner, they shall be forfeited and sold, one moiety to the King, the other to the party discovering.

‡ Is the circuit of every bishop's jurisdiction, for this realm has two sorts of divisions,

Diploma. See tits. *Game; Physician.*

[378]

Direction of Process. See tit. *Process.*

Disabilities. See tits. *Baron and Fine; Infant; Lunatic.*

Discharge. See tits. *Arrest; Imprisonment; Master and Servant; Receipt; Release.*

Disclaimer.

REZ v. HOLT. M. T. 1818. K. B. 2 Chit. Rep. 366.

It appeared, in showing cause against a rule obtained for an information in the nature of a *quo warranto*, that the defendant, a very young man, had not acted, and had no intention of acting. It was contended, that it was necessary that judgment of ouster should be entered.

Sed per Cur. The defendant may enter a disclaimer without costs.

A disclaimer has been in some cases, entered without payment of costs.

[379]

Discontinuance.

I. OF ESTATES.

(A) DEFINITION, p. 379.

(B) BY WHOM CREATED, p. 380.

(C) BY WHAT CONVEYANCE CREATED, p. 381.

(D) EFFECT AND DURATION OF, p. 383.

II. OF ACTIONS.

(A) VOLUNTARILY.

(a) *Rule for.*

1st. In what cases allowed, p. 383. 2nd. Service of, p. 385. 3rd. Taxing costs on, p. 385.

(b) Arrest after, p. 385. (c) Evidence of, p. 385. (d) Costs on, p. 386.

(e) Effect of, p. 387.

B INVOLUNTARILY.

(a) What amounts to, p. 387. (b) When it operates from, p. 392. (c) Consequences of, p. 392. (d) How aided, p. 392. (e) Judgment on, p. 393.

one into shires or counties in respect to the temporal estate; and another into dioceses, in regard to the ecclesiastical state, of which we reckon twenty-one in England and four in Wales; see Co. Lit. 94. also the kingdom is said to be divided in its ecclesiastical jurisdictions into two provinces, of Canterbury and York, each of which provinces is divided into dioceses, and every diocese into archdeaconries, and archdeaconries into parishes, &c.; see Wood's Inst. 2.

The bounds of dioceses are to be determined by witnesses and record, but more particularly by the administration of divine offices; to which purpose, there are two rules in the common law; in one case, upon a dispute between two bishops upon 'his head, the direction is, that they proceed in the business by ancient books or writings, and also by witnesses' reputation, and other sufficient proof; in the other case, where the question was, by whom a church, built upon the confines of two dioceses, should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city, who, before it was founded, baptised the inhabitants and administered to them other divine offices; Gibs. 133.

The jurisdiction of the city is not included in the name of diocese, 'so says the canon law; and accordingly, in citations in general resolutions directed to the clergy, it is ordered to cite the clergy of the city and diocese; see Gibs. 193.

A bishop may perform divine offices, and use his episcopal habit in the diocese of another without leave, but may not perform therein any act of jurisdiction, without permission of the other bishop; see Gibs. 133.

A clergyman dwelling in one diocese and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both, that is, the bishop, in whose diocese he dwells, may persecute him, but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop; see Gibs. 134.

* Is where a tenant, who holds of any lord, neglects to render him the due services, and upon action brought to enforce them, disclaims to hold of his lord; which disclaimer of tenure, in any court of record, is a forfeiture of the lands to the lord; see Finch, 270. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first introduction, or takes upon himself those rights which belong only to tenants of a superiour class; if he affirms the reversion to be in a stranger by accepting his fine, attorning as his

I. OF ESTATES.

(A) DEFINITION.*

(B) BY WHOM CREATED.

[380]

Actual seisin by force of the estate tail is essential to the person discontinuing.†

Hence, a discontinuance can be made only by tenant in tail in possession.

1. DRIVER, D. BURTON, v. HUSSEY. T. T. 1789. C. P. 1 H. Bl. 269.

In this case it was stated at the bar, and assented to by the bench, as a settled rule of law, that, in order to work a discontinuance of an estate tail, it is necessary that the party discontinuing shall be actually seised by force of the entail.

2. DOE, D. JONES, v. JONES. H. T. 1823 K. B. 1 B. & C. 238; S. C. 2 D. & R. 373.

A marriage settlement conveyed an estate to trustees, in trust for the joint lives of A. and his wife, and the life of the survivor; remainder to the use of the trustees and their heirs, for the joint lives of A. and his wife, and the life of the survivor, to preserve contingent remainders; remainder to the use of one of the trustees, his executors and administrators, for five hundred years, to raise a sum of money for the younger children of the marriage, by sale or mortgage of the estate; remainder to the use of the heirs of the body of A., begotten on the body of his wife; and remainder to the use of A., his heirs and assigns, for ever. And A. during the continuance of his life estate, granted a lease of the estate for three lives, with livery of seisin to B. The question was, whether this worked a discontinuance of the settlement in tail.

Per Cur. A discontinuance can only be created by a person who is tenant in tail in possession at the time when he does the act to defeat the settlement. Discontinuance of an estate tail has the effect of working the worst species of wrong that can be, because it destroys all remedy by entry—all right to mesne profits, and gives to the party aggrieved, whether issue in tail or remainder, a remedy by *formdon* only. We ought, therefore, to attend carefully to the authorities, before we say that a particular act creates a discontinuance. Looking at all the authorities upon this subject, we believe it will be found, that no act will create a discontinuance, unless it be the act of the tenant in tail in possession. Here the estate tail in remainder had never taken effect. There is an intermediate estate, which prevented the tenant for life from being seised as tenant in tail in remainder or possession, and consequently, the two estates could not unite to effect a discontinuance.

tenant, collusive pleading, and the like, such behaviour amounts to a forfeiture of his particular estate; see Co. Lit. 253; 2 Bla. Com. 276. If on a disclaimer the lord loses his verdict, he may have a writ of right *sur disclaimer*, grounded on his disavowal of tenure, and shall upon proof of the tenure, recover back the land itself so holden, as a punishment to the tenant for such false disclaimer; see Finch 270; 3 Bla. Com. 238.

* The injury of discontinuance happens, when he who has an estate tail, makes a larger estate than by law he is entitled to do; see Finch. L. 190; in which case, the estate is good, so far as his power extends who made it, but no further. As, if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail, all which are beyond his power to make, for that by the common law extends no further than to make a lease for his own life, in such case the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury which is termed a discontinuance; see 3 Bla. Com. 171. And Lord Coke says, a discontinuance of estate in lands or tenements is properly, in legal understanding, an alienation made or suffered by tenant in tail, or any that is seised *in autre droit*, whereby the issue in tail, or heir, or successor, or those in remainder, or reversion are driven to their action, and cannot enter; see 1 Inst. 325. a.; 3 Cruise. Dig. 359.

† By the common law, the alienation of a husband who was seised in the right of his wife, worked a discontinuance of the wife's estate till the 32 Hen. 8. c. 28. provided that no act by the husband alone shall work a discontinuance of, or prejudice the inheritance or freehold of the wife; but that after his death, she or her heirs may enter on the lands in question. Formerly, also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance; F. N. B. 194. But this is now quite antiquated by the disabling statutes of 1 Eliz. c. 19. and 19 Eliz. c. 10. which declare all such alienations absolutely void ab initio; and therefore at present no discontinuance can be thereby occasioned; see 2 Bl. Com. 172. But if the reversion or remainder be in the crown, the tenant in tail cannot discontinue the estate tail, for the king is a body politic, of all others most high and worthy, out of whose person no estate of inheritance or freehold can pass or be removed without matter of record; see 1 Inst. 335. a.; Plowd. 552; 1 Cruise Dig. 89.

(C) BY WHAT CONVEYANCE CREATED.

[381]

1. *Doe, D. Odiarne v. Whitehead*. H. T. 1759. K. B. 2 Burr. 704: S. C. 2 Kenyon, 346. S. P. *Stephens v. Brittridge*. 1 Sid. 33.

It was resolved that a fine, with proclamations, levied by a tenant in tail in possession, will discontinue the reversion in fee, as well as divest the remainder-man in tail, so as to put him to his writ of *formedon*. See 1 Saund. 258 a.

2. *Hunt. v. Burn*. H. T. 1701. K. B. 1 Saik. 241

A tenant in tail levied a fine to the use of J. S., for the life of J. S., with warranty; and after that levied a fine to the use of himself and his heirs, with warranty; and then bargained and sold to another and his heirs.

Per Cur. The first fine made a discontinuance, but it was only a discontinuance for the life of J. S. because the wrongful estate that causes the discontinuance was only an estate for life, and the discontinuance could remain no longer than that estate. And the second fine could not enlarge the discontinuance, because the estate raised by the fine returned back to the conusor, and, consequently, the warranty which was annexed to it was extinguished; and it would be a vain thing to make a discontinuance for the sake of that warranty, which was destroyed in its creation.

warranty, the first fine holden to be a discontinuance, but only during the life of B.

3. *Took v. Glascock*. E. T. 1645. K. B. 1 Saund. 260.

A. B. being seized in tail of a reversion, bargained and sold the reversion of the same to C. D., and his heirs, who devised the said reversion to the plaintiff.

A. B. having levied a fine with proclamations to a stranger, died. In debt for rent by the plaintiff, it was resolved, that a fine levied to a stranger by tenant in tail, after an innocent conveyance to another, was not a discontinuance.

4. *Stephens v. Brittridge*. T. T. 1660. K. B. 1 Lev. 36.

Tenant for life; remainder to the wife for life; remainder to the heirs of their bodies. They levy a fine with warranty to B. The baron and feme die without issue. The next person in remainder (being a daughter by a former venter), brings an ejectment.

Per Cur. The baron here has but an estate for life, and there is no displacing and divesting of any remainder, but the fine operates only as a grant of *cestuy pur vie*, and the remainder in tail, which they may lawfully grant, and does not disturb any estate in remainder; and if there were any displacing of the estate, yet it is but at the election of him in remainder; as if he will bring

* But it has been stated that there can be no discontinuance of things lying in grant; so that, if a tenant in tail of a rent, advowson, or common, levies a fine of such rent, &c. there is no discontinuance; see 5 Cruise Dig. 228. In general, however, an estate may be discontinued by five modes of conveyance, viz. feoffment, fine, recovery, release, and confirmation; see 1 H. Bl. 269. But where an estate-tail is discontinued, the estates in remainder and the reversion, are also in general discontinued, though, where they are not discontinued, the estate tail is not discontinued; see 1 Inst. 335. a.; T. Raym. 344; Plowd. 552.

A lease by a tenant in tail, which is warranted by the 32 Hen. 8. c. 28., though made by feoffment and livery, will not create a discontinuance; because an act of parliament, to which every man is a party, allows of such leases, which, if tortious, as all discontinuances are, parliament would not allow; but if a lease by feoffment be not warranted by the statute, it will operate as a discontinuance; see 4 Cruise Dig. 66. But a grant cannot in any case create a discontinuance, for every discontinuance works a wrong, whereas a grant only transfers what the grantor may lawfully give; see 1 Inst. 322. a.; 4 Cruise Dig. 57. And the same rule applies to a deed of bargain and sale, see 4 Cruise Dig. 115. 122; and to a covenant to stand seised; *ibid*; and to a conveyance by lease and release; see 4 Cruise Dig. 126.

† Tenant for life, remainder in tail on contingency, remainder over in tail in esse; a fine levied by tenant for life, and heirs in remainder in tail in esse, will not make any discontinuance; see 2 Saund. 346. Where a fine is only levied as a confirmation of some prior conveyance, it will not in that case operate as a discontinuance of an estate tail, or taking away the entry of the remainder-man; see 10 Rep. 95. Where, however, a fine is levied in pursuance of a covenant in a prior conveyance by tenant in tail, as where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly, in that case the lease, and release, and fine, will be considered as one assurance, and will, therefore, operate as a discontinuance of the estate-tail; see 2 Burr. 704. But, as there can be no discontinuance of things lying in grant, if a tenant in tail of an incorporeal hereditament levies a fine, there is no discontinuance; see 1 Inst. 251. b.

Fine by tenant in tail discontinuance the remainder.

Hence, where A., tenant in tail, levied a fine to B. for life, with warranty, and afterwards levied a fine to the use of A. and his heirs, with

But a discontinuance is not [382] worked by a fine levied to a stranger by tenant in tail, after an innocent conveyance to another.

And, where husband, and tenant for life, remainder to the heirs of their two bodies, levy a fine with warranty, it is no discontinuance, nor is the warranty, a bar.

So, where A., tenant for life, re-
mainder to B. for life,
remainder to the heirs
of A., made a feoff-
ment, it was holden
no discontinuance.
And if tenant in tail
[383]
entails, creates a discontinuance of the estate-tail by transferring to the feoffee, not only the possession, but also the right of possession, so as to take away the entry of the issue in tail, as also the persons in remainder, and of the reversioner, and to drive them to their real action: see 1 Inst. 327. a.; 4 Cruise Dig. 55.

his *formedon*, and admit himself out of possession. But if there be no discontinuance, the warranty will be no bar.

5. ADAMS v. SAVAGE. E. T. 1702. K. B. 2 Ld. Raym. 855.

Per Holt, C. J. If a man seised in fee convey his estate by lease and release to the use of himself; remainder to trustees for their lives; remainder to the heirs of his body; he hath an estate tail in him, but he is only tenant for life in possession; otherwise, if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man make a feoffment, it is no discontinuance, but only divests the estate.

6. JONES v. PHILPOTT. M. T. 1660. K. B. 1 Lev. 49.

It was resolved, that a feoffment being made to him in whom the reversion in fee was lodged is not a discontinuance.
And if tenant in tail entails, creates a discontinuance of the estate-tail by transferring to the feoffee, not only the possession, but also the right of possession, so as to take away the entry of the issue in tail, as also the persons in remainder, and of the reversioner, and to drive them to their real action: see 1 Inst. 327. a.; 4 Cruise Dig. 55.

(D) EFFECT AND DURATION OF.

HUNT v. BURN. H. T. 1701. K. B. 1 Salk. 244.

It was resolved, in this case, that there might be a discontinuance which turns the estate to a right, and yet does not take away the right of entry, and that a warranty might bar where the reversion was only displaced, and turned to a right, though the right of entry was not taken away. As if tenant in tail makes a lease for the life of lessee, and after grants his reversion to J. S. and his heirs, with warranty, this warranty is annexed to an estate in fee, and yet there is no immediate discontinuance, so as to toll the right of entry; nevertheless, if this warranty descend upon the issue, and there is assers, this will be a bar, which shows that a warranty may bar without a discontinuance. But a discontinuance remains no longer than the wrongful estate that causes it.

II. OF ACTIONS.†

(A) VOLUNTARILY.

(a) Rule for.

1st. In what cases allowed.

1. LONG v. BUCKERIDGE. T. T. 1717. K. B. 1 Stra. 112.

In replevin. It was prayed, that the avowant might discontinue because he was an actor; but the court said, it is the plaintiff's suit, and how can one man discontinue another's suit? see Wilkinson on Replevin, 45.

* It has been said that a feoffment by tenant in tail, who is actually seised by force of the entail, creates a discontinuance of the estate-tail by transferring to the feoffee, not only the possession, but also the right of possession, so as to take away the entry of the issue in tail, as also the persons in remainder, and of the reversioner, and to drive them to their real action: see 1 Inst. 327. a.; 4 Cruise Dig. 55.

† In a declaration upon an agreement made pending a judgment on an indictment, whereon the defendant had been found guilty, that all other indictments "should be discontinued," it was averred that all such indictments had been wholly discontinued, and not further proceeded with; and it appeared that the plaintiff had taken no steps by *nolle prosequi*, or otherwise, towards putting an end to such indictments, held that the term "discontinuance" means "putting an end to the suit in a legal way," and this not having been shown, the plaintiff was properly nonsuited; 2 Bing. 258.

‡ A rule to discontinue may be had, either before or after declaration. It is a side bar rule, and granted as a matter of course from the clerk of the rules in the K. B. or secondaries in the C. P.; but in the latter court, if it be after plea pleaded, the defendant's attorney must first consent to a rule in the treasury chamber in term-time, or before a judge in vacation, or else there must be a rule to show cause; see Imp. C. P. 727. This rule may be obtained at any time before trial or inquiry, see 1 Salk. 178, 179. And leave has been to discontinue after argument and before judgment on demurrer: id.; but it is never granted after a writ of inquiry executed and returned; see Carth. 86; nor after a peremptory rule for judgment on demurrer; see 1 Salk. 172. And the plaintiff cannot have leave to discontinue pending a rule for judgment, as in case of a nonsuit; see Barnes, 316. And where he moved to discontinue upon payment of costs, after judgment given for him on demurrer, but not entered of record, and a writ of error brought and bail put in thereupon, the Court refused to make a rule to discontinue, without payment of costs on the writ of error; see Barnes, 169. So where after notice of trial given and regularly countermanded, the plaintiff in the C. P. obtained a rule to discontinue upon payment of costs; and it appearing that after the notice of the trial, and before the countermand, a witness for the defendant, who resided in London, had set out for the York assizes; the question was, whether the expense of this witness could be allowed the defendant in costs; the Court held that, as the countermand was regular, the costs for this witness could not be allowed; see Barnes, 307.

2. CHARLWOOD V. MORGAN. T. T. 1804. C. P. 1 N. R. 64.

[384]

On motion to amend a mistake of a christian name in a writ of right, the Court observed, had not this been a proceeding by writ of right, we would have been willing to amend the mistake; but, considering the nature of the proceeding, and how much it has always been discouraged, we think the error fatal to the demandant. Application was then made for leave to discontinue; but the Court said, the same reasons which precluded the amendment applied to a discontinuance.

And the C. P. will not permit the demandant in a writ of right to discontinue.

3. PRICE V. PARKER. E. T. 1696. K. B. 1 Salk. 178.

On a motion to discontinue on payment of costs, the Court held that, after a general verdict, there can be no leave given to discontinue; for that would be having as many new trials as the plaintiff pleases: but after a special verdict there may, because that is not complete and final; but in that case it is of great favour. The same point was so ruled in the case of *Reeve v. Gelding*, Easter, 5 & 6 W. and M. in K. B.

But a discontinuance is permitted after a special verdict, not after a general verdict;

4. BOE, D. GRAY V. GRAY. E. T. 1771. C. P. 2 Blac. 815.

In ejectment after a special verdict, the plaintiff proved for leave to discontinue, on payment of costs, or that the defendant might have judgment, as in case of a nonsuit. It was admitted that this was never done upon general verdicts; but *Price v. Parker* (*supra*), was cited to show that, by permission of the Court, it may be done upon a special verdict, in order to set right any fact that has been misapprehended. To this it was answered, that the special verdict has found that the testator had himself destroyed a will, subsequent to that on which the defendant's title depended; and the plaintiff now wants to prove that it was destroyed by the defendant herself. *Quod fuit concessum*. This, therefore, is an attempt to contradict the former verdict, and not to set it right. Of which opinion was the Court, and discharged the rule.

Nor will the C. P., after a special verdict allow a discontinuance, in order to adduce fresh proof in contradiction of the verdict.

5. TURNER V. TURNER. E. T. 1703. K. B. 2 Ld. Raym. 856. n. 1 Salk. 179.

S. C. Holt. 156.

In debt on bond, the defendant pleaded a composition. The plaintiff demurred; and after a rule for judgment, motion was made for leave to discontinue, alleging, that this was a sham plea, and no such composition had ever been made; 1 Saund. 23. 39; 2 Saund. 73. were cited.

And leave to discontinue was denied, after a rule for judgment upon a demurrer.

Per Holt, C. J. After a rule nisi, and then a peremptory rule for judgment, it can never be allowed. The rule of the old books was, if after an exception was taken, and the Court had given their opinions, the plaintiff would be so hardy as to demur, he must do it at his peril, and so it is here.

2d. Service of.

[385]

WHITMORE V. WILLIAMS. T. T. 1796. K. B. 6 T. R. 765. S. P. MOLLING V.

BUCKHOLTZ. T. T. 1814. K. B. 3 M. & S. 153.

By Reg. Gen., it is ordered, "that on payment of costs to be taxed, &c., the action be discontinued." In this case a rule was served to discontinue, but no appointment was taken out to tax the costs. It was contended, that taking out an appointment in this case was unnecessary, as no costs were due. But the Court said, some costs must be due, and that the rule to discontinue, without an appointment, does not amount to a discontinuance. See 2 Stra. 1209; Barnes, 399.

Merely serving a rule to discontinue, without an appointment to tax the costs, is not itself a discontinuance.

(b) Arrest after. See ante, vol. ii. from p. 310 to 312.

(c) Evidence of.*

(d) Costs on.

1. BUSHEL V. HAYNES. E. T. 1708. K. B. 11 Mod. 170. S. P. AFRICAN

COMPANY V. MASON. E. T. 1714. K. B. 10 Mod. 228; S. C. Gilb. 238.

S. P. ANON. T. T. 1704. K. B. 11 Mod. 89. S. P. MASON V. WATSON.

T. T. 1692. K. B. Comb. 197. S. P. POOLE V. PURDY. M. T. 1696.

K. B. Comb. 299.

The plaintiff's counsel, finding the opinion of the Court against him, prayed to discontinue, which was granted on payment of costs.

A discontinuance is usually granted on payment of costs.

* An averment, in an action for a malicious arrest, that the suit is wholly ended and determined, is proved by evidence of the rule to discontinue upon payment of costs, and that

[386]

And the same rule applies to an executor, when he has, knowingly, brought a wrong action.

As where three actions had been instituted by an executor, the Court refused to permit him to discontinue, unless he paid costs.

But it is otherwise where no blame is imputable.

And where, upon setting aside a verdict for plaintiff, the costs are to abide the event, the plaintiff discontinues, the defendant is not

[387] entitled to the costs of the trial. Upon the common rule to discontinue, on payment of costs, no attachment

2. HARRIS v. JONES. H. T. 1763. K. B. 1 Blac. 451. S. P. HAILE v. NORTON. M. T. 1734. C. P. Prac. Reg. 157; S. C. Barnes, 169.

On motion to discontinue without payment of costs, the plaintiff being an executor. It was said, that he had wantonly brought the action.

Per Cur. The plaintiff applies to the Court for a favour, and we will therefore impose what terms we please upon him. Rule absolute on payment of costs.

3. MELHUISE v. MAUDER. 1 M. T. 1804. C. P. 2 N. R. 72.

The plaintiffs, as executors, having sued one of the co-obligors, on a joint and several bond, in K. B., to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor, in C. B., in which the case having gone off *pro defectu juratorum*, they brought a third action against all the three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the Court would only allow them to discontinue on payment of costs; observing, here has been a multiplicity of actions, which might have been avoided by doing at first what the plaintiffs have done at last; viz. bringing the action against all three obligors. This was only done to exclude the evidence of the co-obligor, and if the defence were not usury, it would be right to make the plaintiffs assent to his being examined as a witness. It seems to us very fit this action should be discontinued, but not without payment of costs.

4. WRIGHT v. JONES. H. T. 1805. K. B. 2 Smith's Rep. 260. BAYHAM v. MATTHEWS. S. P. T. T. 1782. K. B. 2 Stra. 871. n. 4 Burr. 1927.

A rule had been obtained to show cause why the plaintiff, who sued as administratrix, should not be allowed to discontinue without payment of costs.

Per Lord Ellenborough, C. J. If the plaintiff were to proceed in the action, he would not be liable to pay costs, and judgment of *non pros* has not been signed. Why then ought the plaintiff to pay the costs upon discontinuing? Let the rule be made absolute.

5. HOWARTH v. SAMUEL. E. T. 1818. K. B. 1 B. & A. 566.

The defendant obtained a verdict; a new trial was granted. The costs to abide the event. The defendant gave notice of a trial by proviso. The plaintiff obtained a rule to discontinue on the taxation of costs; the Master allowed the defendant the costs of the trial. On a rule for the review of the Master's taxation, the Court said, the defendant was entitled only to the costs of the subsequent proceedings, notwithstanding it was made part of the rule that the costs should abide the event of the trial, for he cannot be in a better situation than if he had obtained a verdict; in which case he would not be entitled to the costs of the first trial.

3d. Taxing costs in.*

STOKES v. WOODSON. M. T. 1796. K. B. 7 T. R. 6.

On an attachment for non-payment of costs, the question was, whether the plaintiff, who had obtained the common rule to discontinue, on payment of costs, was liable to an attachment for non-payment. The Court discharged the costs were taxed and paid, without producing the roll with judgment of discontinuance entered upon it. But it seems, that a judge's order to stay proceedings, on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end; see *Bristow v. Haywood*, 4 Campb. 214; S. C. 1 Stark. 48. abridged post, tit. "Malicious Prosecution." And where it was averred in the declaration that the defendant voluntarily permitted his suit to be discontinued for want of prosecution, and thereupon it was considered by the Court that he should take nothing by his bill, prout patet per recordum, whereby the suit was ended or determined, it was holden that the averment was not proved by the production of a rule to discontinue; but the record having been averred, ought to have been proved; see *Gadd v. Bennett*, 5 Price, 540. abridged post, tit. "Malicious Arrest." When the rule to discontinue is obtained by unfair practice, the Court will discharge it; see 4 Burr. 2532.

* The plaintiff must obtain an appointment from the master in the K. B. or prothonotaries in the C. P. to tax the costs, and serve a copy of it on the defendant's attorney; see 6 T. R. 765. In the K. B. the Master will tax the costs ex parte, if the defendant's attorney do not attend to the first appointment; see *Imp. K. B. 743*. But in C. P., a second copy of the rule must be made in case of non-attendance, and a second appointment obtained thereon, and served as before, and so a third time; and if he do not attend the third appointment, the prothonotaries will tax the costs ex parte; see *Imp. C. P. 727*.

rule, being of opinion that he was not. The rule being conditional, it was no lie for non stay of proceedings; and, therefore, if the costs were not paid, the plaintiff payment thereof might proceed in the action.

(c) *Effect of.*

BRANDT v. PEACOCK. E. T. 1823. K. B. 1 B. & C. 649; S. C. 3 D. & R. 2. When the judgment of discontinuance is entered, it relates back to the day when the original rule to discontinue was taken out.

On the 6th of February, a rule to discontinue the action, on payment of costs, was obtained by the plaintiff. The costs were not taxed until the 11th of March. The Court held that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained, and that the action was to be considered as discontinued from that time.

(B) INVOLUNTARILY.

(a) *What amounts to.*

1. **REGINA v. TUCHIN.** M. T. 1703. K. B. 2 Ld. Raym. 1061; S. C. 6 Mod. 263; S. C. 1 Salk. 51.

On an information for a libel, issue was joined in Trinity Term, and the *venire* was returnable on the 23d of October, which was the first day of the term, and the *distringas* was tested the 24th of October. On motion in arrest of judgment, on the ground that this was a discontinuance, the Court said, the teste of the writ the next day was clearly a discontinuance, because all the process must be tested the same time that it was awarded; and, consequently, the process to the jury here in discontinued, and the *distringas* is without warrant. The *distringas* *juratores* must be tested on the very day on which the *venire* was returnable;

if it be tested on the following or any subsequent day, it will be a discontinuance of process.

2. **ATWOOD v. BURR.** C. T. 1701. K. B. 7 Mod. 3.

On a writ of error brought on a judgment on a *scire facias* against *alias scire facias* bail; it was excepted, that there were two *scire facias* on which this judgment was founded, and the first *scire facias* was not returned as appeared by the record. Holt, C. J. If there is no return, it will be a discontinuance, and that cannot be cured by appearance; but after verdict a miscontinuance is cured, and there being no return to the first *scire facias*, or so much as a recital of it in the second, it is not maintainable. So, if an *alias scire facias* is returned, it is a discontinuance.

3. **WEEKS v. PEACH.** M. T. 1701. K. B. 1 Salk. 179; S. C. 1 Ld. Raym. 679.

- S. P. WOODWARD v. ROBINSON.** E. T. 1721. K. B. 1 Stra. 302. S.

- P. MORLEY v. —.** M. T. 1699. K. B. 12 Mod. 421.

In an action of replevin for taking chattels in a certain place called A., and also in a certain other place called B., the defendant avowed the taking in the place aforesaid, in which, &c. for such a one was seised of the place in which, &c. To this the plaintiff demurred. A plea, beginning as an answer to part only, is a discontinuance; and the plaintiff may take judgment for the part unanswered.

Per Cur. If a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is defective, and the plaintiff may demur; but if a plea begins only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued.

4. **PIERCE v. HENRIQUES.** H. T. 1701. K. B. 7 Mod. 124. S. P. MARKET

- v. JOHNSON.** H. T. 1704. K. B. 1 Salk. 180; S. C. 11 Mod. 36; S. C.

- 2 Ld. Raym. 1131.

In an assumpsit on two counts, the defendant pleaded non-assumpsit as to one, and as to the other, it being for 10*l.*, payment of 99*l.* which the defendant received; but pleaded nothing to the rest; the plaintiff replied, denying the payment; and on demurrer, And if judgment by *nil dicit* be not taken for so much as has not been pleaded to, and replied as to the rest.

Per Cur. The plea is well as to the 99*l.*; for a person may plead several pleas, as payment of part, and a release as to the rest, &c. but here it is a discontinuance; for he should have taken judgment by *nil dicit* for so much as will be a discontinuance.

5. **ANON.** E. T. 1692. K. B. 3 Salk. 131.

In an action of assault and battery, against husband and wife, the original, as recited in the declaration, was of a battery only at one time, but the declaration to re

ply to one of several batteries, is a discontinuance.*
 tion itself was of several batteries done by them at several times, to which several batteries the defendants pleaded; and the plaintiff replied as to one of them only, on which they were at issue, and it was found for the plaintiff.

[389] *Per Cur.* The original not being set out by craving oyer, we will intend it to be right, but mis-recited at the top of the declaration; and the plaintiff not replying to one of the batteries, is but a discontinuance, which is helped by the verdict.

So, reply 6. ALICE v. GALE. M. T. 1712. K. B. 10 Mod. Rep. 112.

ing to a plea in bar, as if in a abatement, *Per Cur.* If a defendant pleads in abatement, and the plaintiff replies as to a plea in bar, it is a discontinuance.

7. CARTER v. DAVIES. E. T. 1691. K. B. 1 Salk. 218; see id. 93, 94. S. P. THOMAS v. LLOYD. H. T. 1690. K. B. 1 Salk. 194; S. C. Comb. 482. S. C. 1 Ld. Raym. 336; S. C. 12 Mod. 195.

Or demur ring in bar to a plea in abatement; On an *indebitatus assumpsit* and a *quantum meruit* for goods; as to the first count, the defendant pleaded *non assumpsit*; and, as to the second, pleaded in abatement, and prayed judgment of the bill. The plaintiff took issue on the *non-assumpsit*, and demurred to the plea in abatement, or to a plea in bar.

Per Cur. The plaintiff having demurred in bar, where the plea is only in abatement, the suit is thereby discontinued.

8. ASLETT v. VINCENT. E. T. 1729. K. B. 2 Ld. Raym. 1483.

Or demur ring after is sue joined; In trespass, the defendant having demurred after issue joined, the Court held it to occasion a discontinuance.

9. CAMPBILL v. ST. JOHN. M. T. 1694. K. B. 1 Ld. Raym. 20.

Or a demur ring to a defendant's demurrer; In an action of trover, brought for a box and 290 pieces of silver, the defendant demurred to the declaration, and the plaintiff demurred to the defendant's demurrer, and concluded, and this he is ready to verify.

The Court held that, demurrer to a demurrer is a discontinuance.

10. BLISSE v. HARCOURT. E. T. 1688. K. B. 1 Salk. 177.

Or a wrong conclusion to prayer of judgment in a replication;† On an *indebitatus assumpsit* the defendant pleaded an attainer of high treason in disability. The plaintiff replied a pardon; and prayed judgment and his damages; to which the plaintiff demurred; and the Court held, that there was a discontinuance by the improper conclusion of the replication; for, an ill prayer of judgment is as if there were no prayer of judgment.

[390]

11. CROW v. MASON. H. T. 1701. K. B. 12 Mod. Rep. 626.

Or to a declaration of M. T. in H. T. the defendant pleads payment of part, since the last continuance, to which there was a demurrer; In an action of debt on a bond, the defendant pleaded in bar as to part, that after the last continuance he had paid so much, which the plaintiff accepted; to which the plaintiff demurred; and, it being a declaration of Michaelmas term, it was adjudged the whole was discontinued; for the plaintiff's proper course would have been to have demurred to the plea, so far as it was pleaded, as he had a right to do, it being after the last continuance, and no acquittance pleaded or produced; therefore, let the plaintiff take judgment by *nil dicat* as to the rest.

12. GROWDER v. GOODSON. M. T. 1774. C. P. 2 Mod. 59.

Or on process from an inferior court, returnable, without mentioning a day certain. In an action for false imprisonment, the defendant justified under process out of an inferior Court, stated to be returnable at the next Court, without mentioning a day certain, the Court held it to be a discontinuance.

13. THE CITY OF LONDON v. WOOD. H. T. 1701. K. B. 12 Mod. Rep. 684.

So, if an action in the city courts be not continued from court to court, it will be a discontinuance. On a writ of error brought on action in the mayor's court against Wood for 400l. as a forfeiture; for that he, being duly chosen sheriff, did not serve, or otherwise discharge himself. Holt, C. J. The points are, 1st, whether, on this record, as certified to us, there does not appear a discontinuance. 2ndly, Whether, on certificate, that the record below is amended, we may amend the
 * So, if a plaintiff declare for the taking of several descriptions of grain, and the defendant justify the taking one sort, but say nothing as to the others, it is a discontinuance; see 2 Mod. 259.

† Or where the defendant concludes his plea in disability, and the plaintiff in his replication in bar; see Carth. 183; or, if there be three replications, and the defendant demurs to one of them, and gives no answer to the other two, and the plaintiff join in demurrer, it is a discontinuance; see 1 Saund. 338.

record before us, by the record set right below. As to the point, whether there be a discontinuance in this case, surely there is; for, every cause ought to be continued from court to court, as in Westminster-hall from term to term, if it be not a real action where long process is allowed; and is not amendable, no *certiorari* lying to this court of the mayor.

14. *J. AUNDER V. CRIFFS*. H. T. 1732. K. B. 2 Stra. 947.

The proceedings were on a day certain, after judgment by default; the writ of inquiry was returnable at a general return, and this was objected on error. It was contended to be but a miscontinuance, and cured by 32 Hen. 8. c. 30., and of that opinion were the Court.

15. *HAYWARD V. KINSEY*. M. T. 1701. K. B. 12 Mod. Rep. 578.

On a writ of error, the Court agreed if a continuance be not alleged, it shall be intended a discontinuance, for it is so of course.

16. *BLAKE V. DODEMEAD*. T. T. 1726. K. B. 2 Stra. 775.

A demurrer was *quod narratio minus sufficiens in lege existit ad actionem manutenend*, and the joinder was *quod bene bonum et sufficiens existit ad execution*, &c.; this was contended to be a discontinuance. But the Court agreed, if the joinder had been otherwise, it would have been a discontinuance, the declaration and writ being synonymous, and the demurrer being wrong, the plaintiff could not demur to it. But upon *scire facias*, as, if defendant demurs, alleging the declaration to be insufficient, to a joinder in demurrer, alleging the writ to be sufficient, is no discontinuance.

17. *BONNER V. HALL*. E. T. 1697. K. B. 1 Ld. Raym. 339.

On an *indebitatus* assumpsit, the defendant pleads in abatement, another action depending in the C. B. for the same cause; the plaintiff replies, that no action was depending for the same cause, and therefore *petit judicium de debito et damnis*, on which the defendant demurs, the plaintiff joins in demurrer, and concludes rightly. It was contended to be a discontinuance, but,

Per J. C. Holt. This case differs from that of *Bisse and Harcourt*; 3 Mod. 281. the plea there being good; and when the plaintiff replied new matter to maintain his writ, he should have made his replication accordingly; where the plaintiff traverses the defendant's plea in his replication, and offers an issue he may pray judgment *de debito et damnis*, because if the matter is tried, peremptory judgment ought to be given; but in this case the first fault is in the defendant, the plea being ill, and therefore the defendant was ordered to answer over.

18. *SERRES V. DODA*. E. T. 1807. C. P. 2 N. R. 405.

Declaration in replevin by A. B. and his wife, without showing any cause for joining the wife. Demurrer. It was contended, that the demurrer not being accompanied with an avowry and prayer of a return, was a discontinuance that when the defendant pleads any plea which takes away the plaintiff's right to the goods, he need not avow; but that in other cases he must; otherwise it is a discontinuance: for such plea does not lead to a determination of the suit. But the Court said, that the only question was whether they would consider the demurrer as frivolous; and not thinking that it was so, they would not hold it to be a discontinuance.

19. *BIRCH V. LENGEN*. E. T. 1681. K. B. 2 Mod. 316.

In one continuance from one term to another, there was a blank. On motion to amend, the case of *Friend v. Baker*, Stiles, 339 was cited: where Roll, C. J. said, that the giving a day more than is necessary, is no discontinuance; but where a day is wanting it is otherwise.

Per Pemberton, C. J. This is not a discontinuance, but an insufficient one; in fact, an omission of the clerk only. But Jones, J., differing in opinion, it was adjourned.

(b) *From what time it operates.*

Knight's Case. H. T. 1702. K. B. 2 Ld. Raym. 1014.

Holt, C. J., said, a discontinuance only relates to the time of its being entered on the record. A discontinuance only operates from the time when it is entered.

So, a continuance to a general return, instead of a day certain, is a miscontinuance, but aidable.

And the omission to allege a continuance is a discontinuance.

[391]
But upon *scire facias*, as, if defendant demurs, alleging the declaration to be insufficient, to a joinder in demurrer, alleging the writ to be sufficient, is no discontinuance.

So, in a replication to a plea in abatement, which tends to an issue, the plaintiff may pray his debt and damages, and it is no discontinuance.

And giving a day more than is necessary, is no discontinuance; but where a day is wanting, it is otherwise.

[392]

A discontinuance as to one defendant, is so as to all.*

A discontinuance is helped at common law by appearance;

Semble contra, and it is doubtful,

whether discontinuance in process be helped by the statute of jeofails;

At any rate it is aided after trial.†

[393]

And a plaintiff since 2

Hen. 7.

cannot discontinue or be nonsuited after verdict, as he might at common law.

The 32 H. 8. c. 30. by which a discontinuance is aided, extends to penal actions.

(c) *Consequences of.*

COUX V. LOWTHER. T. T. 1699. K. B. 1 Ld. Raym. 597.

Adjudged, on stat. 39 Ed. 3., that in trespass a discontinuance as to one defendant is a discontinuance as to all.

(d) *How aided.*

1. **PLYNTER V. BOSEN.** M. T. 1690. K. B. 1 Show. 320.

It was resolved that a discontinuance of process is helped by appearance, and so it was held in the case of *Marshall v. Anderson*, 2 Keb. 34. See 1 Sid. 173; Jenk. Cent. 57.

2. **ANON.** T. T. 1691. K. B. 12 Mod. Rep. 8.

Per Holt, C. J. An appearance does not help a discontinuance, as it does a miscontinuance; and it is a question whether a discontinuance in process is helped by the statute of jeofails; a discontinuance in pleading may be helped.

3. **SALISBURY V. PROCTOR.** H. T. 1695. K. B. 3 Salk. 130.

An action was brought against two defendants, one joined issue, and the other demurred; the issue was tried, and there was a verdict against that defendant; so that no day was to be given to him; but as to the other, day should be given, and continuances entered till judgment; but none being entered, a writ of error was brought, and these discontinuances were assigned for error; for being after verdict, they could not be helped by the verdict.

Per Holt, C. J. Discontinuances are helped as well after the verdict as before; and so it has been adjudged; for the statute says, where the fact is tried, without relating to discontinuances before, more than to those after a verdict.

4. **KEAT V. BARKER.** E. T. 1695. K. B. 5 Mod. 208. S. P. **WALUM V. SMITH.** T. T. 1691. K. B. 1 Salk. 1.

Per Cur. On motion to discontinue, after a general verdict, the Court will not suffer the plaintiff to discontinue his action: it has been allowed after a special verdict, and an argument at bar; so likewise after joining in demurrer, but not after arguing such demurrer. But the stat. H. 4. ordains, that after verdict, a plaintiff shall not be nonsuited; which was otherwise at common law; for if he did not like his damages, he might be nonsuited.

5. **HUMBLE V. BLAND.** E. T. 1795. K. B. 6 T. R. 255.

In error, on a penal statute, on the ground that there was a discontinuance of the suit from one term to another; the 32 H. 8. c. 30. was relied on, which aids all miscontinuance and discontinuance, by the appearance of the party. And in *Smith v. Bower*, Cro. Jac. 528, it was holden that a discontinuance, was aided after verdict. And in *Sedgwick v. Richardson*, 3 Lev. 374, it was held, "that if it should be taken to be a discontinuance, that was remedied by the 32 H. 8, which extends to actions upon penal statutes, they not being excepted."

Per Cur. The objection as to the discontinuance cannot prevail. It is clearly answered by the case in *Dyer*, 346.

(e) *Judgment on.*

The judgment on a discontinuance is, that the plaintiff take nothing by his bill; see *Tidd's Forms*, 266.

DISCOUNT. See tits. *Bills of Exchange*; *Interest*; *Payment*; *Usury*.

DISFRANCHISEMENT. See tit. *Corporation*.

DISHONOUR. See tit. *Bills and Notes*.

DISOBEDIENCE TO ORDER OF JUSTICES. See tit. *Justice of the Peace*.

DISORDERLY. See tit. *Vagrant*.

* And if a defendant makes a discontinuance by his demurrer, the plaintiff may either take judgment, or join in demurrer; see 1 Salk. 4; 2 Ld. Raym. 1006. So, if there be a discontinuance, judgment will be reversed; see Cro. Jac. 591.

† Verdict and judgment by default; see 1 Saund. 288. b. And judgment has been allowed to be entered in another term, after argument, to save a discontinuance; see 1 Ld. Raym. 716.

DISORDERLY HOUSES See tits. *Bowdy-house*; *Dancing*; *Use and Occupation*. [394]

DISPENSATION. See tit. *Ecclesiastical Persons*.

DISSECTION. See tits. *Surgeon*; *Treason*; *Work and Labour*.

DISSEISIN.

(A) WHAT AMOUNTS TO, p. 394.

(B) OF DISSEISINS AT ELECTION, p. 395.

(C) EFFECT OF, p. 395.

(D) WHAT CONSTITUTES A DISCLAIMER OF, p. 396.

(A) WHAT AMOUNTS TO.

1. **BALLARD V. GERARD.** M. T. 1701. K. B. 1 Salk. 333; S. C. 1 Ld. Raym. 703.

It was resolved, that if an office be a freehold, the denial of just fees amounts to a disseisin.

2. **MAYOR OF NORWICH V. JOHNSON.** H. T. 1685. K. B. 3 Mod. 91.

It was contended by counsel, and not denied by the Court, that where a man made a lease for life and died, and then his heir suffered a recovery of the same land without making an actual entry, this is an absolute disseisin, because the lessee had an estate for life; but if he had been tenant at will, it might be otherwise.

3. **KREN V. KIRBY.** E. T. 1674. C. P. 2 Mod. 33.

Ejectment. The lessor of the plaintiff claimed under a surrender made to him by W. Kirby, who had an estate in the land after the decease of his father, but entered during his life. It was adjudged that he thereby became a disseisor, and that the surrender was void.

4. **TAYLOR EX DEM. ATKINS.** H. T. 1757. K. B. 1 Burr. 60 S. C. 1 Kenyon, 143.

A. B. tenant in tail in remainder, entered upon the estate of C. D. tenant for life, under a judgment in ejectment and enfeoffed for the purpose of making a tenant to the *præcipe*. On the question whether this amounted to a disseisin, the court held, that an entry under such a judgment could not possibly be a disseisin; and that a recovery suffered by means of it could not be supported.

5. **WILLIAMS, D. HUGHES V. THOMAS.** H. T. 1810. K. B. 12 East, 141.

Tenant for life having levied a fine, afterwards devised the premises, and died seised. The Court held, that the entry and continuing possession of the devise, (the defendant in this action of ejectment) was no disseisin of the reversioner. Disseisin importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure; and that, therefore, no

* Disseisin is a wrongful putting out of him that is seised of the freehold; see Co. Lit. 277. Disseisin may be effected, either with reference to corporeal inheritances or incorporeal. Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold; see Co. Lit. 151: as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession, but it depends on their respective and various kinds, being, in general, nothing more than a disturbance of the owner in the means of coming at, or enjoying them: see 3 Bla. Com. 179; hence, in an assize between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent was adjudged a disseisin; see T. Raym. 371. So, if lessee for years, from a day to come, enters before the day, and continues afterwards, he is a disseisor; see 1 Sid. 8. And a person entering upon a void grant is a disseisor; see 3 Co. 9. b.; 10 Mod. 265.

† So, a lease and entry by the lessee is not a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseise: *Jerritt v. Weare*, 3 Price. 575, abridged ante, tit. "Covenant." So, where mortgagee covenants that mortgagor shall quietly enjoy, till default of payment, and then assigns; after such assignment, mortgagor is only tenant at sufferance; but his continuing in possession does not turn the term to a right, nor make a disseisin. So a bare entry on another, without an expulsion, makes only such a seisin, that the law will adjudge him in possession only that has the right, and does not work a disseisin; *Smartle v. Williams*, 1 Salk. 245, abridged post, tit. "Mortgage."

Where an office is a freehold, the denial of fees is a disseisin.*

So, if lessor make a lease for life and die, and his son suffer a recovery;

Or if a copyholder in reversion enter upon [395]

the tenant for life, it is a disseisin.

But an entry under a judgment in ejectment can not be deemed a disseisin.†

So, a fine levied by tenant for life, who continues in possession

sion, is no disseisin of the remainder-man.

question could arise whether, considering the devisee of the reversion as a disseisor, a fine *sur cognizance de droit come ceo*, levied by him before entry to a stranger, without any declaration of uses, would bar his right of entry by es-toppel and fortify the estate of the disseisor; or, whether it would simply en-ure to his own use, or be altogether inoperative.

(B) OF DISSEISINS AT ELECTION.*

(C) EFFECT OF.

If a son pur- chase in fee, and be disseised by his father, who makes the d sseisin was not done with any intention to make such feoffment, yet he a feoffment is bound by this alienation.

MAYOR OF NORWICH V. JOHNSON. H. T. 1685. K. B. 3 Mod. 91.

It was stated by the counsel, and not denied by the court, that if a son pur- chase lands in fee, and is disseised by his father, who makes a feoffment in fee to another with warranty, and dies, the son is forever barred; for though the d sseisin was not done with any intention to make such feoffment, yet he a feoffment is bound by this alienation.

[396]

with war- ranty, the son is bound for ever.†

(D) WHAT CONSTITUTES A DISCLAIMER OF.‡

Disseisers, and Dissenting Meeting-Houses and Minis- ters. See tit. *Religion*.

Dissolution. See tits *Corporation; Partners*.

Distiller. See tit. *Brewer*.

Distress. See tits. *Canal; Churchwardens; Ejectment; Fieri facias; Landlord and tenant; Land-tax; Overseer*.

I. DEFINITION AND ORIGIN OF; p. 401.

II. FOR AMERCEMENTS.

(A) FOR WHAT OFFENCES TO BE MADE, AND THE DIFFERENCE BE- TWEEN AN AMERCEMENT AND FINE, p. 401.

(B) BY WHOM TO BE MADE, p. 402.

(C) WHOSE PROPERTY MAY BE SEISED, p. 402.

(D) WHERE TO BE MADE, p. 402.

(E) WHEN TO BE JOINT AND SEVERAL, p. 402.

(F) IN WHAT CASES THE THINGS MAY BE SOLD, p. 402.

III. FOR CUSTOMS, p. 402.

IV. DAMAGE FEASANT.

(A) DEFINITION OF, p. 402.

(B) WHAT THINGS MAY BE DISTRAINED AS SUCH, p. 402.

(C) BY WHOM.

(a) *In general*, p. 403. (b) *In particular*.

1st. *Commoners*, p. 404. 2d. *Lords of Manors*, p. 404.

(D) AT WHAT TIME, p. 404.

(E) DUTY OF THE DISTRAINOR, p. 405.

(F) AS TO DISTRAINING THE SAME CATTLE TWICE, p. 405.

(G) OF THE SALE, p. 405

(H) WHEN THE PARTY MUST BRING HIS ACTION AND NOT DIS- TRAIN. p. 405.

(I) OF THE ACTION FOR IMPOUNDING OR DETAINING CATTLE AF- TER TENDER OF AMENDS, p. 406.

* A disseisor may be, or not be, at the election of him to whom the tort is done; see Carter, 162. As if tenant at will makes a lease for years, it is a disseisin at the elec- tion of him who has the freehold; see Lat. 53. So, if lessor enters upon his lessee for year-, he is only tenant at will; and, though he let to another for years, he is only a dis- seisor at election; but if he let to another for life, he is a disseisor; see 1 Sid. 349.

† Gilbert, in his *Law of Tenures*, p. 21. says, when any man is disseised, the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the right of possession; for, in respect to the disseisee, he has no right at all; but when a de- scent is cast the heir of the disseisor has *just possessionis*, because the disseisee cannot enter upon his possession, and evict him, but is put to his real action, because the freehold is cast upon the heir. And a disseisin being the wrongful act of a stranger is not a breach of the covenant for validity of title; that the person under whom the vendor derives title, had leased part of the premises sold to one, who had afterward entered on the premises demised; *Jerritt v. Weare*, 3 Price, 604. abridged *ante*, tit. "Covenant."

‡ Acceptance of rent from the disseisee amounts to a disclaimer of the intention to dis- seise: *Jerritt v. Weare*, 3 Price, 275, abridged *ante*, tit. "Covenant."

[397]

(J) OF THE ACTION FOR DRIVING THE DISTRESS OUT OF THE COUNTY. &c. p. 406.

V. FOR DOUBLE RENT AND VALUE, p. 407.

VI. FOR FINES.

(A) IN GENERAL.

(a) *Must be reasonable*, p. 407.

(b) *And not jointly imposed*, p. 407.

(B) IN PARTICULAR, p. 407.

(C) BY WHOM IMPOSED, p. 407.

(D) OF THE SALE, p. 407.

VII. FOR PENALTIES TO BE RECOVERED BEFORE JUSTICES, p. 407.

VIII. FOR PORT DUES, p. 407.

IX. FOR RATES, p. 407.

X. FOR RENT.

(A) WITH REFERENCE TO THE SEVERAL KINDS OF RENTS.

(a) *In general*.

1st. *The rent must be certain*, p. 408. 2nd. *There must be an actual demise*, p. 408. 3rd. *And the rest reserved to the persons entitled*, p. 409. 4th. *The deed by which the rent is reserved must be sufficient in point of law*, p. 110. 5th. *As to what rent a distress generally attaches*, p. 410.

(b) *In particular*.

1st. *Assize*, p. 411. 2nd. *Charge*, p. 411. 3rd. *Fee-farm*, p. 411. 4th. *Seck*, p. 411. 5th. *Service*, p. 411. 6th. *Issuing out of furnished lodgings*, p. 411.

(B) WITH REFERENCE TO THE PERSONS WHO MAY DISTRAIN.

(a) Annuitants, p. 412. (b) Assignees, p. 412. (c) Baron and feme, p. 412. (d) Cestui que use, p. 412. (e) Common, tenants in, p. 412. (f) Commoners, p. 413. (g) Conusee of fine, p. 413. (h) ——— statute, p. 413. (i) Coparceners, p. 413. (j) Corporators, p. 413. (k) Curtesy, tenants by, p. 413. (l) Devises, p. 413. (m) Dower, tenants in, p. 413. (n) Elegit, tenant by, p. 414. (o) Executors and administrators, p. 414. (p) Feme covert, p. 414. (q) Free bench, tenants by, p. 414. (r) Gavelkind, persons seised in, p. 414. (s) Grantees, p. 415. (t) Guardians, p. 415. (u) Heirs, p. 415. (v) Joint-tenants, p. 415. (w) The King, p. 415. (x) Le-gatees, p. 416. (y) Lessees, p. 416. (z) Life tenants for, p. 416. (a 1) Lords of manors, p. 416. (b 1) Lunatics, committees of, p. 416. (c 1) Mortgagee, p. 416. (d 1) Parceners, p. 417. (e 1) Receivers, p. 417. (f 1) Tail, tenants in, p. 417. (g 1) Trustees, p. 417. (h 1) Vie, tenant, per autre, p. 417.

(C) WITH REFERENCE TO THE PERSONS WHOSE GOODS MAY BE DISTRAINED.

(a) Ambassadors, p. 417. (b) Bankrupts, p. 417. (c) Coparceners, p. 417. (d) Joint-tenants, p. 418. (e) The King's, p. 418. (f) ——— his grantees, p. 418. (g) Strangers, p. 418. (h) Under-tenants, p. 418.

(D) WITH REFERENCE TO THE THINGS WHICH MAY BE DISTRAINED.

(a) *In general*.

1st. *Must be valuable*, p. 419. 2nd. *Capable of identification*, p. 419. 3d. *Not perishable*, p. 419. 4th. *In use*, p. 419. 5th. *For a special purpose*, p. 420. 6th. *Nor belonging to the freehold*, p. 420.

(b) *In particular*.

1st. *Cattle, agisting*, p. 420. 2nd. *Corn, grass, hay, hops, &c.* p. 420. 3d. *Implements of trade*, p. 421. 4th. *Lime kilns*, p. 421. 5th. *Plough, beasts of*, p. 421. 6th. *Trees, shrubs, and plants*, p. 422. 7th. *Wearing apparel*, p. 422.

(E) WITH REFERENCE TO THINGS IN THE HANDS OF THIRD PERSONS.

(a) Carriers, p. 423. (b) Executors and administrators, p. 423. (c) Factors, p. 423. (d) Innkeepers, p. 424. (e) Stable-keepers, p. 425. (f) Wharfingers, p. 425.

(F) WITH REFERENCE TO THINGS IN THE CUSTODY OF THE LAW, p. 426.

(G) WITH REFERENCE TO THE PLACE IN WHICH A DISTRESS MAY BE MADE.

(a) In an enclosed place, p. 428. (b) Not in the highway, p. 428. (c) Not on other lands than those on which the rent is charged, p. 428.

(H) WITH REFERENCE TO THE PERIOD LIMITED FOR MAKING A DISTRESS, p. 428.

(I) _____ THE MODE OF CONDUCTING A DISTRESS.

(a) *In general.*

[400] 1st. Of the demand of, and tender of the rent, p. 429. 2d. By whom.
1. By bailiffs, p. 429. 2. By Landlords, p. 429.
3d. At what time to be made, p. 430. 4th. Of the warrant, p. 430. 5th. Of breaking open doors, &c. p. 430. 6th. Of the inventory, p. 431. 7th. Of the notice, p. 431. 8th. Of the appraisement, p. 431. 9th. Of the sale, p. 432. 10th. Of the removal, p. 433. 11th. Of the surplus, p. 433. 12th. Of the duty of the distrainer, p. 434. 13th. Of the charges to be paid to the distrainer, p. 434.

(b) *In particular.*

1st. Where the goods are already in execution, p. 434.

(J) WITH REFERENCE TO THE MAKING SEVERAL DISTRESSES FOR THE SAME RENT, p. 435.

(K) _____ MAKING A JOINT DISTRESS FOR SEVERAL RENTS, p. 435.

(L) _____ A FRAUDULENT REMOVAL.

(a) *What cases are within the statute*, p. 435.

(b) *Form of seising such goods*, p. 436.

(c) *Of the penalty.*

1st. By whom incurred, and how proved, p. 437. 2nd. Remedy for.

1. By application to justices, p. 438. 2. In the superior courts, p. 438.

3. Appeal from justices of the peace to sessions, p. 439.

(d) *Of pleading the clandestine removal*, p. 439.

(M) WITH REFERENCE TO DISTRAINING WHERE NO RENT IS DUE, p. 440.

IX. FOR PORT DUES, p. 440.

X. FOR SERVICES, SUITS, AND RELIEFS.

(A) OF FEALTY, p. 440.

(B) OF HERIOTS, p. 440.

(C) OF COURTS LEET, p. 440.

(D) OF COURTS BARON, p. 440.

(E) OF CUSTOMARY COURTS, p. 440.

(F) OF COPYHOLD SERVICES, p. 440.

(G) OF RELIEFS, p. 440.

XI. FOR TAXES, p. 440.

XII. FOR TOLLS, p. 440.

XIII. EXCESSIVE.

(A) ACTION FOR.

(a) *When maintainable*, p. 441.

(b) *Form of*, p. 441.

(c) *Declaration*, p. 443.

(d) *Evidence*, p. 443.

(e) *Witnesses*, p. 443.

(B) INDICTMENTS AND INFORMATIONS FOR, p. 443.

XIV. IRREGULAR, p. 444.

XV. WAVER OF, p. 445.

XVI. EFFECT OF, p. 446.

XVII. OF THE ACTION TO RECOVER BACK MONEY GIVEN TO RELEASE PROPERTY ILLEGALLY DISTRAINED, p. 446.

XVIII. OF PLEADING A DISTRESS, p. 447.

XIX. OF RESCOUS AND POUND BREACH, p. 447.

XX. OF REPLEVING DISTRESSES, p. 447.

I. DEFINITION AND ORIGIN OF.*

* The term "distress" is derived from the French word "*distresse*;" in Latin, it is

II. FOR AMERCEMENTS.

(A) FOR WHAT OFFENCES TO BE MADE, AND THE DIFFERENCE BETWEEN AN AMERCEMENT AND FINE. See *ante*, vol. i., from p. 603 to 607.

(B) BY WHOM TO BE MADE.*

| 402 |

(C) WHOSE PROPERTY MAY BE SEIZED.†

(D) WHERE TO BE MADE.‡

(E) WHEN TO BE JOINT AND SEVERAL.§

(F) IN WHAT CASES THE THINGS MAY BE SOLD.||

III. FOR CUSTOMS. See *ante*, vol. vi. tit. Copyhold, p. 508, and vol. vii. tit. Custom, p. 492.

IV. DAMAGE FEASANT.

(A) DEFINITION OF. See *ante*, vol. vii. p. 497.

(B) WHAT THINGS MAY BE DISTRAINED AS SUCH.*

1. VASPOR V EDWARDS. H. T. 1701. K. B. 12 Mod. 660.

Per Holt, C. J. If many cattle are doing damage, a man cannot take one of ^{One beast cannot be taken for} called "*districcio sive augustia*," because the things distrained are put into a strait, which we call a pound; see Co. Litt. 96. a. A distress is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for the wrong committed; see 3 Bla. Com. 6; Brad. Dist. 1. This remedy appears to be of such remote antiquity, that we have no memorial of its origin; and as this power was anciently used by the lords it grew as burthensome and grievous to tenants, as the feudal forfeiture; there being no difference to the tenant between the lords seizing the land itself, turning him out of possession, and his stripping him of the whole produce of it at his pleasure; and not only the produce of the farms, but the *inducta* and *illata*, and every thing that was brought on the land were liable to the lord's distress. By this means, all the plunder of the war which the vassal had brought home was often carried off by the lord, and the distress by his power removed out of the reach of the tenant, and that on the slightest occasions. The power, thus practised, did not only oppress the tenants, but put them so entirely under the control of the lords, as to enable them to bring great numbers of vassals into the field against their prince, and thereby disturb the public peace of the kingdom. But these oppressions ended with the distractions of the barons' wars; for, towards the end of the reign of Henry III. there were particular laws made to regulate the manner of distraining, not permitting the lords to extend this mode of proceeding beyond the mischief it was first introduced for, which was no more than to empower the lord, by seizing the chattels, to oblige the tenant to perform the feudal services. These were to remain in the lord's hands, as pledges to compel the performance, and the detention was no longer lawful than while the tenant refused to do the services which were reserved by the feudal contract; see Brad. Dist. 2; 2 Inst. 102. 103; Gilb. Dist. 2.

A distress is of two kinds, either for non-payment of rent or other duties, or for cattle trespassing and doing damage, see Brad. Dist. 1.

* Amercements may be made by a court baron or leet; but for those made in the former, there can be no distress in the absence of a prescriptive right; see 11 Co. Rep. 45; unless in the case of the king; Cro. Eliz. 748.

† The property of a stranger cannot be seized for an amercement, it being merely a personal offence; see 2 Hawk. P. C. 59.

‡ The statute of Marlbridge does not apply to a distress for an amercement, and consequently it may be made in the highway; see 11 Co. Rep. 42; so as it be within the jurisdiction of the Court; see 1 Roll. Abr. 670, and it be on the lands of others, provided the offender's goods be there; *ibid.* And it has been holden that, if a man belonging to one district of a leet be amerced in the court leet, his goods may be taken in any part of its jurisdiction, though in a different district; see 11 Co. Rep. 44.

§ No person shall distrain, as for an entire sum, where there are several amercements due for distinct offences, as each amercement ought to be levied separately; see Gilb. Dist. 58. And though where one offence is committed jointly by several persons, the amercement may be joint; yet it must be severally affixed upon each, and several distinct distresses must be made for such amercements. But where the commission of the offence is several on each of the defendants, the amercements must be several also; see 11 Co. Rep. 42.

|| The power of selling the distress for an amercement belongs only to a court leet, and therefore an amercement in a court baron cannot be sold without a special custom or prescription to warrant such sale; see Noy. 17.

* Beasts, *not in use*, may be distrained damage feasant; see 6 T. R. 133; but the distress must be confined to the very thing which is committing the injury; see Willes, 638. And things can be considered as damage feasant only on a private soil; so, that corn pitch-

damage committed by several. them as a distress for the whole damage; but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest. See Willes, 638.

[403]
And cattle cannot be distrained, which have escaped by default of the fences, which the party distraining ought to have repaired.*

Semble; that tithes may be distrained damage feasant.

2. *E. MOORE v. TUCKER*. T. T. 1704. K. B. 6 Mod. 198.

In replevin, the defendant made conscience as bailiff to J. S. for rent on a demise by the said J. S. of the place where, &c. and pleaded in bar, &c. that J. S. whose fee it was, time out mind used and ought to repair and maintain the fences between the place where, &c. and the plaintiff's land next adjoining, and through want of repair the plaintiff's cattle escaped into the place where, &c., and were distrained for damage feasant; and on demurrer,

Holt, C. J. It is impossible to say when the plaintiff's inheritance is charged with the repairs, he should take advantage of his own wrong in not repairing, by making the escaping cattle a distress for damage feasant. See 2 Saund. 290. n. 7.

3. *BAKER v. LEATHES*. M. T. 1810. Ex. Wight. 115.

In an action for not removing tithes, the judge told the jury, that the length of time was not to influence them as to the damages, because after a reasonable time the landholder might have distrained them damage feasant. On motion for a new trial, the Court said this is the first time we ever heard of a distress for a tithe's damage feasant; possibly it may be.

(C) BY WHOM.

(a) *In general.*

BURT v. MOORE. T. T. 1793. K. B. 5 T. R. 329.

As a distress for damage feasant is made on account of an immediate injury to the enjoyment of land, the right of distress consequently

will pass to a grantee of the herbage of the soil.

The plaintiff, by indenture, demised to the defendant the milk and calves of twenty-two cows, provided and to be provided by the plaintiff, and which should at his expense run, be fed, and depastured on certain grounds; to have and to hold the said milk and calves for one year, at a certain rent. And the plaintiff covenanted, that no other stock than the twenty-two cows, and a mare of the defendant's, should feed on the said premises. The defendant entered on the dairy, and during the term other cattle of the plaintiff's were found depasturing on the premises, which the defendant distrained and impounded. To trespass for breaking and entering the plaintiff's close, and taking and impounding his cattle, the defendant justified taking the cattle as a distress, because they were doing damage in the place in which, &c. Replication *de injuria sua propria*.

Per Cur. This demise of the dairy is a demise of the soil, and exclusive use of all the grass that should grow on the close: particularly enumerated in the lease, to be taken, it is true, by the mouths of the plaintiff's cattle; but these cattle were also demised to the defendant. Although the defendant was restrained, by the agreement to a particular mode of occupation, he was also considered as occupier of the land; and being entitled to the sole use of the land, was also entitled to maintain trespass, or to justify distraining the plaintiff's cattle damage feasant there.—*Postea* to defendant

(b) *In particular.*

1st. *Commoners.* See *ante*, vol. v. from p. 689 to 691.

2d. *Lords of Manors.* See *ante*, vol. v. p. 663 to 665.

(D) AT WHAT TIME.

1. *VASPOR v. EDWARDS*. H. T. 1700. K. B. 12 Mod. 660, 661.

A distress, damage feasant, must be made whilst they are doing the damage and there fore cannot be taken, though pur

Per Cur. If a man come to distrain, and see beasts on his ground, and the owner chase them out before the distress be taken, though it be for the purpose of preventing the distress, yet the owner of the soil cannot distrain them; and if he does, the owner of the cattle may rescue them, for the beasts must be in a market, or hides brought there for sale, cannot be distrained as damage feasant; for, property cannot be said to be damage feasant in a public market where persons have a right to bring their goods for sale; see Cro. Eliz. 75. Noy. 19; Willes. 623. But where any thing is placed improperly on another soil, it is not necessary that it should actually do an injury to the soil, or its produce; if it incumbers, it will suffice; see T. Jones, 193; Brad. Dist. 204.

* Formerly it was holden otherwise; see 2 Saund. 289.

be damage at the time of the distress, and they cannot be taken on fresh purpose^{ly} driven off by their own^{er}.

2. CLEMENT V. MILNER. H. T. 1800. N. P. 3 Esp. 95.

To trespass for taking a cow, the defendant justified taking her as a distress damage feasant. It was proved that the fence was out of repair, which it was the plaintiff's duty to amend; that his cow had entered the defendant's field, whose servant turned her out; she entered again, and the defendant seeing his servant driving her out, ran towards the place where the cow was; however, she had entered the plaintiff's field at that time, into which the defendant entered, and drove the cow back into his field, and thence to the pound. There being contradictory evidence,

Lord Eldon, C. J. If the jury are of opinion that the cow was actually out of the *locus in quo* before the defendant had got into it, though he might be it, the act of approaching in order to distrain her, they must find for the plaintiff. If, on the other hand, they thought the defendant had got into the field where the cow was committing the trespass before she had been turned out of it, they must find for the defendant.

(E) DUTY OF THE DISTRAINOR.

GIMBART V. PELAH. T. T. 1748. K. B. 2 Stra. 1272.

The defendant justified impounding cattle damage feasant. And on evidence it appeared, that he put them in the next pound, though it happened to be in another county. And, on 3 Lev. 48. the Chief Justice held, it did not make him a trespasser, though it subjected him to the penalty in the statute 1 & 2 Philip and Mary, c. 12; wherefore a verdict was given for the defendant.

(F) AS TO DISTRAINING THE SAME CATTLE TWICE.†

(G) OF THE SALE.‡

(H) WHEN THE PARTY MUST BRING HIS ACTION, AND NOT DISTRAIN.

CHURCHILL V. EVANS. E. T. 1809 C. P. 1 Taunt. 529.

In this case the Court held that, if two persons have the concurrent possession of land, for the purpose that each may take profit of a special nature and distinct form, but not inconsistent with the right of the other, the one cannot distrain the cattle of the other damage feasant, the remedy, if any, being by action.

(I) OF THE ACTION FOR IMPOUNDING OR DETAINING CATTLE AFTER TENDER OF AMENDS.

ANSCOMB V. SHORE. H. T. 1808. N. P. 1 Camph. 85; S. C. 1 Taunt. 261.

S. P. SHERIFF V. JAMES. M. T. 1823. K. B. 1 Bing. 341; S. C. 8 Moore, 334.

A declaration on case for detaining the plaintiff's cattle in the pound after a tender of amends, after stating, that the plaintiff's cattle had been distrained, damage feasant, alleged that, whilst the defendant was in possession of the said cattle, under such distress, &c. plaintiff tendered satisfaction in discharge of the said damage; and the plaintiff requested the defendant to re-detain.

* So, if cattle be damage feasant yesterday, and again to-day, they can only be distrained for the damage they are doing when they are seized see Full. N. P. 91; though a distress for rent may be made in the day-time, cattle damage feasant may be distrained in the night, because the beasts may be gone before that time arrives; see Inst. 142. But they cannot at any time be distrained in the king's highway, unless at the instance of the king; 52 Hen. 3. c. 51.

† By the 52 Hen. 3. c. 4. the cattle shall be impounded in the county in which the distress was made. And where the cattle was put into a pound in another county, the distrainer was holden to be a trespasser; see 2 Stra. 1272. They may be put into a pound overt, or pound covert; if put into the latter, the distrainer must feed them; see 1 Stra. 47.

It is also the distrainer's duty to use caution in endeavoring to distrain damage feasant; for, if he improperly drive and chase them, so as to injure the cattle, he will be liable to an action for the damages; see 3 Leon. 15.

‡ The same cattle may be twice distrained, if they the second time do damage on the land, although their owner may have replevied them after the first distress, for this is a new injury; see F. N. B. 71.

§ The 2 W. & M. does not affect distresses damage feasant; consequently, they remain as they were at common law, mere pledges, and the selling of them will make the parties distraining trespassers *ab initio*; Selw. N. P. 670.

But it seems, if the distrainer once enter the *locus in quo* whilst the cattle are in it, they cannot afterwards be driven off, so as to avoid the distress.

It is the distrainer's duty to impound in the same county.†

When two persons are entitled to distinct rights in the same close, they cannot distrain each other's cattle, [406] but must proceed by action.

Case will not lie for detaining plaintiff's cattle in the pound after tender of a

mends liver and restore the said cattle to the plaintiff, yet the defendant would not receive the money so tendered in discharge and, consequently, the plaintiff, in order to obtain the same, was obliged to pay the defendant a greater and unreasonable sum, to wit the sum of 5*l* 5*s*. for the supposed damage. It was contended, that it was the defendant's duty to have accepted the amends; although the law gave the summary remedy of distress to the party grieved, it was only for the purpose of compelling satisfaction, that the detention of the cattle, after this offer, was tortious, and that, at any rate, the plaintiff was entitled to recover the 5*l* 5*s*. See *per Mansfield, C. J.* It would be dangerous to try the legality of a distress in this form of action. The plaintiff has mistaken his remedy; he has complained of the cattle being detained from him. Now, the law has pointed out the specific redress—that is, replevin; if he had pursued that course, he might have recovered his cattle immediately after they were impounded. It was then urged, that he could not have maintained replevin, as the tender of amends had not been made till after the cattle were impounded. *Per Mansfield, C. J.* Then the question is at an end; every person who has read Co. Lit. knows that a tender, after the cattle have been impounded, comes too late; for they are in the custody of the law; and there could be no tort on the part of the defendant in detaining them.

(J) OF THE ACTION FOR DRIVING THE DISTRESS OUT OF THE COUNTY, &c.

POPE V. DAVIS. H. T. 1810. C. P. 2 Taunt. 252.

In an action for driving a distress out of the county. This was an action on the statute 1 & 2 Ph. & M. c. 12. for driving a distress out of the hundred into another county. The venue was laid in the first county. The judge before whom the trial took place, conceived that the venue ought to have been laid in the latter, and directed a nonsuit. A rule nisi [407] had been obtained to set it aside. It was argued, in showing cause, that the offence was not complete, but by impounding the distress in another hire. The Court made the rule absolute. The venue may be laid in either county.

V. FOR DOUBLE RENT AND VALUE. See tit. Double Rent and Value.

VI. FOR FINES.

(A) IN GENERAL.

(a) *Must be reasonable*† (b) *And not jointly imposed.*‡

(B) IN PARTICULAR.§

(C) BY WHOM IMPOSED.||

(D) OF THE SALE.**

VII. FOR PENALTIES TO BE RECOVERED BEFORE JUSTICES. See tit. Justice of the Peace.

VIII. FOR PORT DUES. See tit. Port Dues.

* Cattle distrained for damage feasant, and in a private pound, the agent of the distrainer (his wife) staying at the time they were distrained to be sent to the public pound. Held, first, that the tender of amends to her was sufficient; and secondly, that whilst they were in the private pound, in the course of being taken to the public pound, the tender was too late; see 4 Bing. 230.

† A fine which is not reasonable and moderate is illegal, and not binding: and, whether it be reasonable is a question of law. see 11 Rep. 45, Brad. Dist. 171.

‡ If several persons be guilty of one offence, they should not be jointly, but severally fined; for as a fine is commonly imposed, not for any general neglect of duty, but for a particular and personal misfeasance, it belongs to the very nature of the offence that its punishment should be confined to the individual who is guilty of it; see Brad. Dist. 172.

§ Fines are generally imposed for acts of contempt and disobedience; see Brad. Dist. 160; and *post*, tit. Fine.

|| Courts of record may impose fines; hence a court-leet being a court of record, and the steward a judge there, he may impose a reasonable fine; see Cro. Eliz. 5-1; Moore, 470. But, for an offence out of court, as not coming to do suit there, the steward cannot fine; Cro. Eliz. 241.

** The power of selling a distress for a fine belongs only to a court-leet; and, therefore, if it be imposed by a Court-baron, unless there be a custom or presumption to warrant it, the distress cannot be sold; see Noy. 17.

IX. FOR RATES. See tits. Churchwardens; Poor-Rates.

X FOR RENT.

[408]

(A) WITH REFERENCE TO THE SEVERAL KINDS OF RENT.

(a) *In general.*1st. *The rent must be certain.*

PARKER V. HARRIS. H. T. 1670. K. B. 4 Mod. 78; S. C. 1 Salk. 262.

A lease for years reserved rent *after the rate of 18l per annum*. It was contended and resolved by the Court not to be a good reservation, because it may be in corn, or any thing satisfactory. Besides, an action may be brought every day, or every hour, there being no time limited when the rent shall be paid.

The rent must be certain as to sum and time of payment.*

2nd. *There must be an actual demise.*

1. HEGAN V. JOHNSON. M. T. 1809. C. P. 2 Taunt. 148.

Replevin. Cognizance. It appeared that the plaintiff held the premises under an agreement for a lease; the plaintiff had been in possession for three quarters of a year. At the trial, the jury, under the judge's direction, who thought there was no demise so as to support the cognizance, found a verdict for the plaintiff. A motion was made to set aside this verdict. The Court refused the rule, observing that, where a party is in possession of premises under an agreement for a lease, and no other circumstances exist whence an implied tenancy can be raised, since no rent is due for the occupation, but only, if any, a compensation in nature of rent, the owner cannot distrain for non-payment.

The owner of land possessed by a party under an agreement for a lease can not distrain.

2. DUNK V. HUNTER. H. T. 1822. K. B. 5 B. & A. 322.

In this case it appeared that a tenant was in possession under a memorandum of agreement to let on lease, with a purchasing clause for 21 years at the net clear rent of 63l. the tenant to enter any time on or before a particular day. It was contended that this agreement did not amount to a lease; and that, unless the tenant held under a demise at a specific rent, the landlord had no right to distrain for rent arrear. No lease had been executed, and no rent had ever been paid. *Per Cur.* Upon the whole, therefore, it seems to us that the parties contemplated the execution of a future lease. Then, if this was not an actual demise for 21 years, the party did not, at all events, hold at the annual rent of 63l.; and, if so, the plaintiff, by law, could not distrain, the rent not being fixed. If a person bargains for a lease for 21 years, the rent is estimated upon an average for the whole term, and it may be of no benefit to the party whatever for the first year of his occupation. Here, the rent of 63l. is estimated on the terms of there being a lease granted, and, at the time when the distress was made, no lease was granted, and no payment of rent had taken place. We think, therefore, that the plaintiff did not hold the premises at any specific rent; and that the defendant's only remedy was by an action for use and occupation, in which the amount of the rent would be a question to be left to the jury.

There must be an actual demise to the tenant at a fixed rent.

[409]

3rd. *The rent must be reserved to the persons entitled.*

1. OATES V. FRITH. Hob. 130.

A lease for years was made by a tenant in fee-simple and his son and heir apparent, to commence after the death of the father, reserving the rent to the son by name, but not reserving it to the heir or heirs of the father.

The rent should be reserved to the persons entitled,†

* Therefore, according to the ancient common law, the lord could not distrain upon the tenant in Frankalmoinage, because his duty was to perform divers services, uncertain both in time and number; see Litt. Sers. 136. But it was, in all cases, sufficient, if the rent could be reduced to a certainty; see Co. Litt. 96. a. As, where plaintiff entered a farm under an oral agreement for a lease for ten years, and though the time for paying rent was settled, it did not appear what was the amount to be paid, the lease was never executed, but the plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years. Held, that the lessor might distrain; see 3 Bing. 361.

for it has been said, if the reservation be

† And not to a stranger; and, therefore, it ought to be reserved to the feoffor, donor, lessor, or his heirs, for they only have a priority of estate; see Litt. Sect. 246; Co. Litt. 214. But this does not extend to a lease, by two joint tenants reserving rent to one of them, for

bad, it will destroy the rent. The Court held, that the son could not take the rent at all, for it was only as heir of his father that he could take it; and neither to the heir or heirs of the father was it reserved.

2. *SACHEVEREL v. FROGATE*. M. T. 1671. K. B. 1 Vent. 162.

However, that point seems questionable; Resolved, that, if lessor for 100 years should let for 50, reserving rent to him and the heirs during the term, that the rent would go to the executor; though, it is true, if the lessor reserve the rent to himself, it will neither go to the heir or executor.

3. *SACHEVEREL v. FROGATE*. M. T. 1671. K. B. 1 Vent. 162.

And where tenant in tail reserved the rent to his heirs generally, Tenants in tail made a lease, reserving a rent to him and his heirs. It was resolved a good lease to bind the entail; for the rent shall go to the heir in tail along with the reversion, though the reversion were to the heirs generally.

{ 410 } 4th. The deed by which the rent is reserved must be sufficient in point of law.†

the rent was holden to go to his heirs in tail* 5th. As to what rent a distress generally attaches ‡

SMITH v. MAPLEBACK. M. T. 1786. K. B. 1 T. R. 441.

Where a lessee for years assigned over his term, and afterwards the lease came back into the hands of the original lessor by an agreement between him and the assignee, that the lessor should have possession of the premises, paying a certain sum annually above the rent towards the S., the plaintiff, being possessed of the premises for a long term of years by indenture of lease demised the same to R. for the term of eight years, at the rent of 31l. 10s. R. entered and took possession. Two years after, R. by indenture, in consideration of 145l. 13s., assigned the premises to W. for the remainder of the term, who soon after, by indenture, assigned over to M. who entered and took possession under that assignment. The plaintiff, S., afterwards applied to M. to take the premises, which he consented to, and the following agreement was entered into: "Agreed between S. and M. for, &c. (the premises, naming them.) S. to have the house on the terms as mentioned in the lease, and to pay 8l. 10s., over and above the rent, annually, towards the good-will already paid by M." S., the plaintiff, took possession of the premises under the agreement, he being entitled to the reversion (after the determination of the eight years' term) at the time the agreement was made. The defendant, as bailiff of M., distrained for a quarter's rent. In replevin, he has a *priority* of contract and estate; *ibid.* Nor is it applicable to the King, who may in general reserve a rent to a stranger; see *Ld. Raym.* 36.

And if there be no special reservation, it will enure according to the nature of the estate; see 1 Vent. 162. But, if there be a specification of the rent to the lessor without naming any other persons, as heirs, executors, &c., to whom it shall be paid, the rent will be confined to the person to whom it is so reserved, and it will cease at his death; see *Hardw.* 95; unless it be reserved payable during the term, which will preserve the rent until the end of the term, and the law will distribute it according to the nature of the estate; see 1 Vent. 162.

† The rent must be reserved by a sufficient deed or conveyance, to pass the estate; see *Co. Litt.* 96, a; *Bac. Ab. Rent.* (C). Hence, at common law, it could not be reserved upon a bargain and sale, because only a use was transferred. But now, by 27 Hen. 8. c. 10. the possession being executed to the use of the bargainor, he may distrain for the rent; see *Co. Litt.* 144. a.

‡ The remedy of distress seems to have been anciently considered so essential to the nature of a rent, that, if a man granted a mere right of distress in a particular manner to a certain amount, it operated as a good reservation of a rent; see *Co. Litt.* 147. a. And it was also a rule that rent could not be granted out of incorporeal hereditaments; as a fishery common, or franchise; but only out of land or tenements, to which the grantee might have recourse to distrain; see *Co. Litt.* 67. a. It was formerly held, that a payment reserved in a lease of tithes was not to be considered as a rent; see *Cro. Jac.* 111; *Carth.* 178. But now it has since been considered as creating a rent; see 1 *Ld. Raym.* 77. And, though it will bind the lessee, by way of contract, it cannot be made the subject of distress; see 2 *Saund.* 302; *Co. Litt.* 47. a. However, the produce of land is not incorporeal; and, therefore, a lease of the pasture or herbage reserving rent is good, and the lessor may distrain the cattle on the land; see *Co. Litt.* 47. a. And the King may reserve a rent out of any incorporeal hereditament, because he may, by his prerogative, distrain either for a rent-service or rent-charge, on all the land of lessee; see 4 *Co. Rep.* 4; *Bro. Ab. Distress*, pl. 49.

Where, for seventeen years, the tenant had settled the rent in account, deducting erroneously sums on account of assessments made on premises, as well those in his occupation; held that the landlord, knowing, or having the means of knowing, all the facts, a mistake as to legal rights would not entitle him to claim the amount so erroneously allowed, nor could he distrain for them as rents unpaid; see 4 *Bing.* 11.

the question on the case reserved for the opinion of the Court was, whether good will M. could distrain for any and what rent? The Court were of opinion, that the agreement was a surrender of the whole term. That M. had no right what-soever to distrain; for, as to the rent in the lease, if the original lessor were even tenant to the lessee under the agreement, yet as having an interest in the premises, M. was to pay rent in his own hands, that balanced the rent claim-greem-ent ed, and thus there was nothing in arrear. And as to the 8l. 10s., they said, that was not to be paid by way of rent, but was intended to be a payment of a sum in gross, for which M. might maintain an action of *assumpsit*. and therefore that the sum so reserved was a mere *annual sum in gross*, and not a rent for which such assignee could distrain.

already paid by the assignee, it was held that such a surrender of the whole term

(b) *In particular.*

[411]

1st. *Assize*.* 2d. *Charge*.† 3d. *Fee farm*.‡ 4th. *Seck*.§ 5th. *Service*.||
6th. *Issuing out of furnished lodgings*.

NEWMAN v. ANDERTON. T. T. 1806. C. P. 2 N. R. 224.

In this case there was an avowry justifying the taking a distress for rent ar-rear for a ready-furnished lodging. It was urged that no right of distress ex-isted. *Sed per Cur.* There seems to be no reason why the remedy by dis-tress should be lost on account of the value of the property being enhanced by the addition of some chattels. Few tenements are let without some chattels. It never has been contended hitherto, that a landlord was deprived of his re-medy because a looking-glass, or some other chattel, was agreed to be taken with the premises demised.

The rent of ready fur-nished lod-gings may be distrain ed for.

(B) WITH REFERENCE TO THE PERSONS WHO MAY DISTRAIN.

[412]

(a) *Annuitants*

FAIRFAX v. GRAY. M. T. 1779. C. P. 2 Blac. 1326.

The plaintiff in 1776 did, by lease and release, convey to F. and J. and their heirs, certain lands to the use of N. for 99 years, if he so long lived, on the trusts thereafter mentioned, and subject thereto, to the use of the said plaintiff for her life, with divers remainders over. The trust of the term was, that the said N. might yearly, during his life, receive and take thereout an vested in annuity, or rent, of 250l. The defendant, as bailiff of N., distrained for ar-rears. It was objected by the plaintiff, that the 99 years' term being vested in N., he could not distrain upon lands in his own legal possession, though he might bring an ejectment. *Sed per Cur.* The plaintiff, during the 99 years' term, is, by her own act and consent, a mere under-tenant to N., at the rent of 250l. per annum, for which he paid a valuable consideration. To this rent a distress is incident by law, exclusive of the clause in the deed; so that there is no colour for the objection.

An annuit-ant may dis-train for ar-rears, tho' a term be vested in himself, to secure the payment.

(b) *Assignees*.** (c) *Baron and feme*.†† (d) *Cestui que use*.‡‡

* Rents of assise are the subjects of a distress; see 4 Geo. 2. c. 28; Gilb. Dist. 5.; Brad. Dist. 34; and *post*, tit. Rent.

† Rent-charge was denominated so, because the lands were charged with distress by force of the deed only, and not of common right; see Lit. sect. 217; but now, by the 4 Geo. 2. c. 28. this species of rent is expressly charged; see *post*, tit. Rent.

‡ In *Bradbury v. Wright* (2 Doug. 624, abridged *post*, tit. Rent), it was holden, that a distress was not incident to a fee-farm rent as such, except the case was brought within the 4 Geo. 2. c. 28.

§ For a rent-seck at common law there was no distress; see 3 Bla. Com. 42. But by the 4 Geo. 2. that remedy was given; see *post*, tit. Rent.

|| For rent-service the right to distrain vested in the lord before the 4 Geo. 2. c. 28; see *Comyn L. & T.* 91; Gilb. Dist. 4. and *post*; tit. Rent.

** The assignees of a bankrupt may distrain; see Brad. Diss. 90. But the assignee of a term cannot distrain, though he reserves a gross annual payment, because there is no privi-ty of estate; *Smith v. Maplebank*, 1 T. R. 441; abridged *ante*, 410.

†† In no case can the wife distrain alone. And it may be laid down as a general rule, that for all rents due in right of the wife, the husband may distrain alone; see 2 Saund. 195. even if it accrue to her in *auter droit*; see *Ld. Raym.* 369; 1 Salk. 206; 4 T. R. 617; however, with respect to rent due for land, in which the wife has only a chattel in-terest, it would seem that the husband may, at any time, during the coverture, distrain for

‡‡ The *cestui que* of a rent-charge, since the statute of uses, is entitled to distrain; see 2 Mod. 138.

(e) *Common tenants in.*

HARRISON v. BARNBY. E. T. 1793. K. B. 5 T. R. 246.

Tenants in
common
[413]
may dis-
train sever-
ally.*

Premises were devised to two, as tenants in common; the terre-tenant had notice from both of their interest, but one of them having demanded the whole of the rent, and indemnified the tenant, he paid the whole rent to that one, whereupon the other distrained for a moiety. In replevin. The Court were of opinion, that he might do so; the terre-tenant having wrongfully paid to one after notice from the other not to do so.

(f) *Conncners.* See *ante*, vol. v., p. 689 to 691.(g) *Conusee of fine.*† (h) *Conusee of statute.*‡(i) *Coparceners.* See *post*, *Parceners.*(j) *Corporators.*§ See *ante*, vol. vi., from p. 776 to 778.

[414] (k) *Curtsey, tenants by.*|| (l) *Devisees.*** (m) *Dower, tenants in.*†† (n) *Eligit, tenant by.*‡‡

(o) *Executors and Administrators.*§§

HOOL v. BELL. H. T. 1696. K. B. 1 Ld. Raym. 172.

Executors
of tenant
for life may
distrain.

Per Cur. The 32 Hen. 8. is a remedial law, and shall extend to the executors of all tenants for life; and the law has been so settled ever since the statute.

(p) *Feme Coverts.* See *ante*, tit. Baron and Feme.(q) *Free bench, tenants by.*||(r) *Gavelkind, persons seised in.*

the arrears due before or after the marriage; see Co. Litt. 46. b. But if the husband die without reducing such chattel real of his wife's into possession, it survives to her, and the arrears of rent whether accrued before, or during coverture, do not belong to his executor; but go where the reversion to the wife surviving, who may distrain for it accordingly; see Co. Litt. 351. a.; 1 Roll. Abr. 350; Brad. Dist. 62.

* And it seems not jointly; see Litt. sect. 317. Unless the thing be incapable of division: see Co. Litt. 197. a.

† The conusee of a fine levied of his own rent to his own use may distrain; see T. Jones, 2.

‡ The conusee of a statute-merchant or staple may distrain; see 2 Vent. 327; 4 Co. Rep. 82. hence if a lease for years be made, reserving rent, and then the lessor acknowledge a statute which is extended, the conusee, after the extent, may distrain for the rent; see 2 Vent. 327. But he cannot distrain for rent incurred previous to the acknowledgment; see *ibid*.

§ The 4 Geo. 2. c. 28. has placed corporators on the same footing as other persons, with regard to the right of distress; hence where a lease was made by the agent of a corporation, and was invalid for want of form, it was holden that, as the tenant occupied the premises and paid rent, it was sufficient to constitute a tenancy from year to year. And that the bailiff to the corporation might distrain; see Wood v. Tate, 2 N. R. 57; (*abridged post*, tit. "Rent.")

|| A tenant by curtesy may distrain at common law, but he is not within the meaning of the 32 H. 8. c. 37; see Brad. Dist. 68.

** Devisees may distrain in respect of their reversionary interest; for, by a devise of the reversion, the rent will pass as its incident; see 1 Vent. 3 Hen. 8. c. 1; Litt. Sect. 585, 586; Brad. Dist. 87. And if a man devises a rent out of his land, and charges the land with distress, the devisee may distrain; but unless the power is given him by the will he cannot distrain it; see Shep. Touchstone, 439.

†† A tenant in dower may distrain of common right; see Co. Litt. 169. b.; unless the thing be uncertain in its nature; see Co. Litt. 84. b.; Brad. Dist. 70.

‡‡ A tenant by eligit may distrain; see Bro. Dist. pl. 72; 2 Sid. 29. But his executors and administrators cannot; see 32 Hen. 8. c. 37.

§§ At common law, executors or administrators of a man seised of a rent, service, charge, seck, or fee-farm, in fee-simple, or tail, could not distrain for the arrears incurred in the life-time of the owner; see Co. Litt. 162. a. But now, by the 32 Hen. 8., the executors and administrators in such cases may distrain upon the lands chargeable, so long as they remain in the possession of the tenant who ought to have paid, or of any other person claiming under him by purchase or descent. But this statute extends only to executors of persons seised of a rent in freehold; see Cro. Car. 471; Ld. Raym. 472; and not to rent granted for years, see Cro. Car. 471; and is only applicable to cases where the testator himself might have distrained; see 4 Co. Rep. 506. However, where a term for years vests in executors or administrators, they may, of course, distrain for the rent accruing in their own time, as if they were entitled to it in their own right; see Brad. Dist. 83.

||| A tenant by free bench may distrain; see 1 Vent. 163; Cro. Eliz. 524.

LEIGH v. SHEPHERD. H. T. 1821. C. P. 2 B. & B. 465; S. C. 5 Moore, 297.

In replevin, the question was, whether the defendant, as being only one of the several claimants, who were co-heirs in gavelkind, could, without the authority of his co-heirs, distrain for the whole, or any part of rent in arrear? The Court said, in the case of Pullen v. Palmer, (5 Mod. 72.) Holt, C. J., laid it down, that one joint tenant may distrain for the whole, but must avow, in his own right and as bailiff, to the rest; and that he may distrain for the whole in point of interest, and needs no authority from the rest to distrain, but may do it by law. The rent, when recovered, will, of course, be received by defendant for the equal benefit of his three co-parceners as well as of himself.—Judgment for defendant.

(s) Grantees.* (l) Guardians.† (u) Heirs.‡

(v) Joint tenants.

PALLEN v. PALMER. M. T. 1694. K. B. 5 Mod. 72; S. C. 3 Salk. 207; S. C. 1 Ld. Raym. 495.

In replevin for taking several cattle, the defendant avowed in his own right, for that W. R. was seised in fee of, &c., and granted a rent charge to A., B., and C., and ten more, who granted to the defendant and to twelve more; and that four of the said thirteen are since dead, and nine alive, of whom he is one; and that for one year's rent, due at such a time he distrained. On a murmur to this plea, it was objected that the defendant ought not only to justify in his own right, but that he ought likewise to make consuance, as bailiff to the rest, who were living. *Per Cur.* One joint tenant may distrain, but he cannot avow solely; and therefore this avowry must abate, because it is always on the right, and the right of this rent is in all of them; and therefore the Court cannot adjudge the right of the writ of *return' habend'* to one alone; for which he, the defendant, ought to have made consuance, as bailiff to the rest.

(w) The king.|| (x) Legatees.**

(y) Lessee.

1. ——— v. COOPER. E. T. 1768. C. P. 2 Wils. 375.

In replevin, the defendant avowed under a distress for rent, due from the plaintiff to him upon an assignment of a lease of a term for years to the plaintiff, in which assignment there is no clause of distress: the single question was, whether this is such a rent for which a distress can be made, there being no reversion in the defendant? *Per Cur.* If a man has a term of years, and grants all his estate of the term, rendering certain rent, he cannot distrain for it, in the absence of a reservation to that effect.

* At common law the grantees of the king may distrain; see 1 Roll. Abr. 294; unless the lands be held of the Duchy of Lancaster, and not situate within the county palatine; see Co. Litt. 314. b.; Plowd. 221; 4 Inst. 209. By the 22 Car. 2. c. 6. the grantees of the crown shall have the same remedies as the crown; and therefore may distrain upon lands under a sequestration; see 2 Vern. 713; 4 P. Wms. 306. But that statute only applies to fee-farm rents sold under its authority; see Bro. Prerog. pl. 68.

† Guardians may distrain; see Gilb. Diss. 29; Brad. Dist. 90.

‡ The heir may distrain, but the distress must be according to the nature of the estate descending; and if the rent be not specifically reserved to him, the law will distribute it; see Co. Litt. 214. a.; but when he is entitled to the rent, he is also entitled to all its incidents; and, therefore, a nomine poenae to secure the rent, will likewise descend to the heir; however, the heir's right of distress does not extend to the arrears of rent accrued in the life-time of the ancestor, for such arrears belong to the personal representatives of the ancestor, and not to the heir; see Brad. Dist. 86.

§ And the survivor may distrain for the arrears accrued in the life of his deceased companion; see 2 Rol. Abr. 86.

|| The king's right to distrain is paramount to that which belongs to his subjects; see Co. Litt. 309; for he may distrain, not only on the land of his tenant out of which the rent issues, but also on other lands of the tenant, although held of other lords; see Bro. Prerog. pl. 77. But the lands must be in the actual possession of such tenant; see 4 Inst. 117; 2 Inst. 132.

** As the bequest of a chattel interest does not, like a devise, vest absolutely by the testator's will, but the interest of the legatee must await the executor's consent to the bequest, consequently, before such assent the interest remains in the executor, and the legatee cannot distrain; see Toller's Executors, 239.

[415]

[416]

If a lessee of a term assigns, he cannot distrain for the rent, with out a clause for that purpose;

And as a landlord has a right to take possession of the premises, at the expiration of the term the tenant holding over cannot distrain his property.

2. TAUNTON V. COSTAR. M. T. 1797. K. B. 7 T. R. 431.

The defendant, who was only tenant from year to year, had regular notice to quit, on the expiration of which, the plaintiff entered, and put his cattle therein. But the defendant, as he had not given up the possession of the premises to the plaintiff, distrained the cattle. In replevin,

Per Cur. Here is a tenant, whose term has expired, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. There can be no doubt of the landlord's right to enter upon the land at the expiration of the term.—Judgment for the plaintiff.

(z) *Life, tenants by.**

(a 1) *Lands of manors.* See *ante*, vol. vi. p. 508.

[417] (b 1) *Lunatics, committees of.*† (c 1) *Mortgagee.*‡ (d 1) *Parceners.*§ (e 1) *Receivers.*|| (f 1) *Tail, tenants in.*** (g 1) *Trustees.*†† (h 1) *Vie, tenant per autre.*‡‡

(C) WITH REFERENCE TO THE PERSONS WHOSE GOODS MAY BE DISTRAINED.

[418] (a) *Ambassadors.*§§ (b) *Bankrupts.*||| (c) *Coparceners.*a (d) *Joint tenants.* b (e) *The king's.* c (f) *The king's grantees.* d (g) *Strangers.* e

* Tenants for life, may distrain, unless they make lease, which amounts to a disposition of their whole estate; for, in that case, they cannot distrain at common law, for want of reversion; but, by 4 Geo. 2. such rent is now distrainable as a rent-seek; see Brad. Dist. 72.

† As committees of lunatics may, by the 43 Geo. 5. c. 75. grant leases of the lunatic's estate, they are also entitled to distrain.

‡ The mortgagee's right to distrain does not extend to arrears due before the mortgage; see Brad. Dist. 99.

§ Co-parceners, before partition, are considered in law as one; see Lit. 163. b.; and therefore must join in making a distress; see *Stedman v. Page*, 4 Mod. 141. abridged post, tit. "Replevin." But it is otherwise after partition, for they may then distrain severally; see Co. Lit. 164. b.; and see post, tit. "Parceners."

|| Receivers appointed by the Court of Chancery must distrain as such, and not in their own names; see 3 Atk. 750.

** Tenants in tail may distrain under leases made in conformity with the 32 Hen. 8. c. 28; see Brad. Dist. 71.

†† Persons who have estates vested in them, in trust for others, may distrain; see Brad. Dist. 90.

‡‡ Under the 32 Hen. 8. c. 37. s. 4. tenants *per autre vie*, and their executors and administrators, may distrain for arrears due at the death of the *cestui que vie*.

§§ By the 7 Anne, c. 12. the goods of all ambassadors, or other public ministers of any foreign province or state, or the domestic servants of such ambassadors or public ministers, are privileged from distress; but, where the servant of an ambassador rented a house and let part of it in lodgings, it was holden that his goods on the premises not being necessary for the convenience of the ambassador, were clearly distrainable for the poor's rates; *Novello v. Toogood*, 1 B. & C. 554; S. C. 2 D. & R. 833.

||| If a trader, after committing an act of bankruptcy, take a shop and agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent in advance becomes due on the day on which the tenant enters, the landlord after an assignment under the commission, and before the year expired, may distrain on the premises for half a year's rent; *Buckley v. Taylor*; 2 T. R. 601. abridged *ante*, vol. iii. p. 690. By the 6 Geo. 4. c. 16. s. 74. no distress is to be available against creditors for more than one year's rent, the landlord being compelled to prove the rest under the commission.

a If coparceners of copyhold lands make partition without notice to the lord, he may distrain upon them jointly; see *Latch. Rep.* 201.

b One joint-tenant is not liable to be distrained upon for a rent-charge created by another; see Brad. Dist. 110; but if they hold of each other, the distress may be entire; see Co. Litt. 186; *Dro. Dist.* pl. 69. As if one tenant in common grant a rent, and afterwards lease the land for years to his co-tenant, he will hold the land subject to a distress for the rent-charge; see *ibid.*

c No distress can be made upon the land in possession of the king; see Bro. Dist. pl. 46; Brad. Dist. 107.

d In some cases the king's grantee is privileged from distress. As where the land is once absolutely vested in the king; for, although where the king enters without office or record, his patent may be distrained upon; yet, if he be entitled by office or record, and grant the land, no distress can be made upon his grantee; see Bro. Dist. pl. 47; this rule is however

e Property belonging to a stranger on the demised premises may be distrained, unless it be there for a temporary purpose, as a horse standing in a blacksmith's shop to be shod; or cloth at a tailor's to be made into clothes; or corn sent to a mill or market; see 3 Bla. Com.

(h) Under-tenants.*

(D) WITH REFERENCE TO THE THINGS WHICH MAY BE DISTRAINED.

[419]

(a) In general † 1st. Must be valuable.

DAVIS v. POWELL. M. T. 1738. C. P. 2 Mod. 249; S. C. Willes, 46.

In trespass for distraining deer, it was contended they were *feræ naturæ*, and not distrainable. But, it appearing that they were chiefly kept for profit and not for pleasure, the defendant had judgment. The thing distrained must be valuable.†

2nd. Capable of identification. § 3rd. Not perisadable. ||

4th. In use.

STOREY v. ROBINSON. H. T. 1795. K. B. 6 T. R. 138. S. P. SIMPSON v.

HARTOFF. M. T. 1744. C. P. Willes, 512.

To trespass for seising and leading away plaintiff's horse upon which he was riding, the defendant pleaded that he distrained him damage feasant. On demurrer, *Per Cur.* The plaintiff must have judgment. If it were permitted to a party to distrain a horse while any person is riding him, it would perpetually lead to a breach of the peace. Whatever is in use cannot be distrained, as a horse on which a man is riding. **

5th. For a special purpose.

SIMPSON v. HARCOURT. M. T. 1744. C. P. cited 4 T. R. 568.

Per Willes, C. J. Things delivered to persons exercising their trade, as cloth to a tailor, cannot be distrained. Things delivered for a special purpose cannot be distrained.

6th. Not belonging to the freehold.

SIMPSON v. HARCOURT. M. T. 1744. C. P. cited 4 T. R. 568.

Per Willes, C. J. Thing affixed to the freehold, such as an anvil or millstone, cannot be distrained. Things affixed to the freehold cannot be distrained. ††

confined to a distress made in respect of rent issuing out of the land itself, and not of a rent charge upon it; for, by the office and record, he who was possessed of the land is ousted, and the land vested absolutely in the king, and therefore the lord, whose title is destroyed, cannot afterwards distrain upon the grantees. But a rent-charge is not destroyed by such office or record, being only suspended by the possession of the king, who cannot hold land subject to a charge; see *Bro. Dist. pl. 27*; but if the rent-charge as well as the land were bound by the office, it seems that the remedy of distress would be absolutely gone; see *Brad. Dist. 108, 109*.

§ And the same rule holds as to cattle, if they be on the premises without their owner's knowledge or default. As where cattle stray into the land through defective fences, which the tenant or his landlord is bound to repair, they cannot be distrained; see 1 *Roll. Abr. 668*; 2 *Roll. Rep. 124*. But if there be no such neglect, and a stranger's beast be upon the land, by escape or otherwise, though they be not *levant et couchant*, they may be distrained; see *Co. Litt. 476*.

* The goods of under-tenants are liable to be distrained. But previous to the 4 *Geo. 2. c. 28*, such distress could only be made during the continuance of the original lease, and not upon a renewed lease; see *Brad. Dist. 114*. But now, such renewal of the principal lease shall be completely valid, without a surrender of the under leases; and the original lessor, and his executors, &c. may distrain upon the under-lessees, for the rent reserved upon the renewed leases.

† Under a demise of a granary and wharf, the piles of which supported the granary, it was holden that a barge attached by a rope to the piles was properly distrainable; the premises being useless without the privilege of attaching barges, &c., 4 *Bing. 137*.

‡ Therefore, dogs, cats, rabbits, and animals, *feræ naturæ*, cannot be distrained; see *Bla. Com. 7*.

§ Things which cannot with certainty be identified, are exempt from distress; see 1 *Roll. Abr. 667*; therefore loose money, meal, or the like, not confined in a bag or sack, and consequently bearing no mark by which they could be known, cannot be distrained; but when inclosed in a bag, which might be marked and known, they could; and its identity established, the objection ceases; see 1 *Roll. Abr. 666*.

|| That which is perishable, and cannot be returned to the owner in as good plight as when it was distrained, is not the subject of a distress; as milk, fruit, &c.; see 3 *Bla. Com. 9*; *Gilb. Dist. 31*; but as the latter, see the 11 *Geo. 2. c. 19*.

** Or an axe in a carpenter's hand; see *Roll. Abr. 167*; *Sid. 440*; or wearing apparel whilst on the person of the owner; see 1 *Esp. 206*; *Peake, 36*. And although it was formerly considered that, a cart and horses, when carrying corn or hay, might be distrained for rent service; see 2 *Keb. 529*; 1 *Sid. 442*; yet it must now be deemed illegal, as being a thing in immediate use.

†† As doors, windows, furnaces, &c. which are, as it were, part of the house; *Co. Lit. 47. b*. Nor does a temporary severance of such things from the freehold, for a necessary and beneficial purpose, suspend the privilege; and therefore, a millstone, which is exempt as a fixture to a mill, cannot be distrained, if it be temporarily removed for the purpose of being picked for the mill, though it would be otherwise, if it were wholly and permanently

It has been said, cattle agisting for one night in their way to London, may be distrained.*

Before 2 W. & M. corn could not be distrained,† [421] Even tho' in sheaves.

Implements of trade,† not in use, may be distrained, if there be no other property, as a stocking loom.

Other property ought to be distrained before beasts of the plough;|| but where, on the estimate made at the time of taking the distress, there did not appear

(b) *In particular. 1st. Cattle agisting.*

FOWKES v. JOYCE. T. T. 1633. K. B. 3 Lev. 260; S. C. Lutw. 1161.

The plaintiff, who was bringing beasts to London by consent of the defendant and his lessee, put them into his land for a night to feed; the defendant having distrained them for his rent arrear, the Court held them liable to the distress; for there was no reason that beasts coming to London, from remote parts of the realm, should be privileged against the distress of landlords for their rent.

2nd. *Corn, grass, hay, hops, &c.*

1. SIMPSON v. HARCOURT. M. T. 1744. C. P. cited 4 T. R. 548.

Per Willes, C. J. Corn was not distrainable before the statute 2 W. & M. c. 5., because it could not be restored in the same plight as when it was taken.

2. WILSON v. DUCKET. M. T. 1774. C. P. 2 Mod. 61.

In trespass for taking corn, it was contended that corn in sheaves might be distrained; but the court said it could not be returned in the same condition as when it was taken, because a great deal might be lost in carrying it.

3d. *Implements of trade.*

SIMPSON v. HARCOURT. M. T. 1744. C. P. cited 4 T. R. 568; S. C. Willes. 512; S. P. GORTON v. FALKNER. H. T. 1792. K. B. 4 T. R. 365.

Trover for a stocking loom. Upon a special verdict, it appeared that the plaintiff was possessed of a stocking loom, which he let to A. at 9d per week. A. was indebted to the defendant in 50l. for rent arrear, and no other sufficient distress being on the premises, the defendant distrained the loom, at the time when A.'s apprentice was using it. The questions were, first, Whether a stocking loom had any privilege at all from being distrained? and, secondly, If it has, whether it may not be distrained when there is no other sufficient distress to be found?

Per Cur. This loom is certainly an instrument of trade, and we are of opinion, that it may be distrained when no other distress is to be found. But here the loom was privileged by being in actual use, because it could not be restored in the same plight, for the stocking then weaving must necessarily be damaged; besides, when it is in the custody of any person, in actual use, it cannot be taken away without a breach of the peace.

4th. *Lime kilns.* § 5th. *Plough, beasts of.*

JENNER v. YOLLAND. T. T. 1818. Ex. 6 Price, 3; S. C. 2 Chit. Rep. 167.

In an action for taking beasts of the plough for distress, whilst there were other things, it was left for the jury to say, whether the defendant; by due diligence, could have known that there was sufficient distress without taking the beasts of the plough? The jury found for the defendant. On motion for a new trial, on the ground of misdirection of the Judge; it appeared that the defendant separated from the mill; see Y. B. 14 Hen. 8. c. 25 b. It is undecided whether machinery fixed by bolts to the floor of a factory can be distrained; see 13 Price, 459; S. C. 1 M'Clell. 217.

* But where they are on their way to a market, and are turned in for the night for their necessary refreshment, they are privileged for the public benefit; see 2 Saund. 290. n.; 2 Vent. 50, Lev. 260; Lutw. 1161; however, cattle permanently agisting, may be distrained; see Roll. Abr. 9; Cro. Eliz. 549.

† However, that statute only authorised the distress of sheaves or shocks of corn, or corn loose or in the straw. But the 11 Geo. 2 c. 19. provides that, the landlord shall seize all sorts of corn whatsoever, growing upon any part of the estate, &c.; and the same may cut, gather, and lay up till ripe, in some proper place, &c. And by 2 & 3 W. & M. c. 5. hay is distrainable. And by the 11 Geo. 2. c. 19. grass, hops, roots, &c. may be distrained; but by the 56 Geo. 3. c. 50. no sheriff, or other officer, shall sell or carry off from any lands any straw, chaff, or turnips, in any case; nor any hay or other produce contrary to the covenants between the landlord and tenant. And by s. 6. of the same act, landlords cannot distrain for rent on purchasers of crops severed from the soil.

‡ And the same rule applies to implements of husbandry; as cattle, &c.; see 2 Inst. 123. Roll. Abr. 667.

§ A lime-kiln, being considered not to be a personal chattel, but belonging to the freehold, is exempt from distress; see 4 T. R. 504.

|| By 61 Hen. 3. s. 4. no man shall be distrained of the beasts of his plough, or his sheep, either by the king or any other, while there is another sufficient distress.

ant had distrained beasts of the plough, and the furniture also, but that part sufficient only had been sold; that the beasts of the plough had been sold first, according to the custom of selling the out-door property first: that an estimate had been made at the time of taking the distress, but there did not appear sufficient without taking the beasts of the plough.

Per Cur. The case was properly left to the jury. It has been said, that the sale is sufficient to support the averment of an excessive distress. That is not proved, unless the distress itself was illegal; here it seems to have been properly made. The direction was, whether there was reasonable diligence used in the estimate? and we think it right. On the estimate, it does not appear there was sufficient property without the beasts of the plough. The rent was 19*l.*; the appraisement 21*l.*; being 13*l.* or 14*l.* more than the rent. It has been said there might be a second distress, leaving the beasts of the plough for the second; but there is no reason why the landlord should incur the probable risk of the tenant driving them away, or their being taken in the mean time in execution by a judgment creditor.

6th. *Trees, shrubs, and plants.*

CLARK v. GASKARTH. T. T. 1818. C. P. 8 Taunt. 431; S. C. 2 Moore. 491.
S. P. CLARK v. CALVERT. H. T. 1819. C. P. 8 Taunt. 742; S. C. 3 Moore, 96.

The question in this case was, whether trees, shrubs, and plants, growing in a nursery ground could be distrained. It was urged that they might, as the statute 11 Geo. 2. c. 19. s. 8., after enumerating certain crops, empowered the landlord to seize, as a distress, any "other product whatsoever, which shall be growing on any part of the estate demised." But the Court held, that the word "product," in the eighth section of the statute, did not extend to trees and shrubs growing in a nurseryman's ground; but that it was confined to products of a similar nature with those specified in that section, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, was incidental.

7th. *Wearing apparel.*

BISSET v. CALDWELL. H. T. 1793. K. B. N. P. Peake 37. S. P. BAYNES v. SMITH. M. T. 1794. K. B. N. P. 1 Esp. 206.

In trespass it appeared that the plaintiff had taken furnished lodgings, and the rent being in arrear, the defendant had distrained the plaintiff's wearing apparel, which were in the lodgings. It was contended that the things taken were not subject to distress. But Lord Kenyon, C. J., observed, the same reason does not now exist as formerly, when *averia caruæ*, &c. could not be taken by the common law; because the things distrained being then taken only as a pledge, it was considered that the person losing those things was rendered incapable of earning money to pay the debt, being serviceable to the commonwealth.

Wearing apparel may be distrained.

[423]

(E) WITH REFERENCE TO THINGS IN THE HANDS OF THIRD PERSONS.

(a) *Carriers.** (b) *Executors and Administrators.*

BRAITHWAITE v. COOKSEY. T. T. 1790. C. P. 1 H. Bl. 465.

In replevin for taking the goods of the plaintiff, there were three several *A distress* *may be* *made after* *the decease* *of the ten* *ant upon* *the proper* *ty in the* *hands of* *the execu* *tors or ad* *ministra* *tors.* *vowries and conusance; the first was, that for six years next before the end of the term one W. B. deceased, in his life-time, and E. B. as administratrix, held and enjoyed the premises in the manner following: viz. the said W. B. for and during part of the time, and until the time of his death, and the said E. B. as his administratrix, from the said W. B. for and during the residue of the term, under a certain demise thereof theretofore made, and before the time when, &c. demised at a certain yearly rent, viz. 65*l.* 3*s.*; and that such yearly rent was in arrear and unpaid for six years of the said demise, ending on, &c. to the amount of 39*l.* 18*s.*; and therefore the defendants avowed and acknowledged the taking of the goods and chattels in the declaration mentioned,*

* Goods, whilst in the hands of a common carrier, or even a private person undertaking to carry them for hire, being *pro hac vice* considered as a carrier, are exempt from distress; *Gisbourn v. Hirst*, 1 Salk. 249. abridged *ante*, vol. v. p. 57. 61.

for and in the name of a distress for the rent so due and in arrear. The second avowry and consuance stated the yearly rent and arrear to be the same as the first, and that the plaintiff was the tenant at the time of the distress made; and, the third was like the second, except that the yearly rent was stated to be 42*l.*, and the arrears to be 252*l.* To each avowry and consuance there was a general demurrer; and, after argument,

Per Cur. The three principal statutes concerning distresses for rent in arrear have made these avowries good; the 32*d* Hen. 8. c. 37 s. 4. enables the landlord to distrain against executors and administrators; the 8 Ann. c. 14. s. 6 and 7. to distrain within six months after the end of the term; and the 11 Geo. 2. c. 19. to avow generally.—Judgment for the defendant. See 1 Roll. Abr. 672; Co. Lit. 47. b.

(c) *Factors.*

GILMAN v. ELTON M. T. 1821. C. P. 3 B. & B. 75; S. C. 6 Moore, 243. Principal's goods in a [424] factor's possession are exempt from distress.* On the 5th March the plaintiff sent bombasines, marked, "J. G.," being the initials of his name, to one A. B., who was a factor and broker, to be sold by him for and on account of the plaintiff. On the 14th of April A. B. died, and the goods remaining unsold in his counting-house and ware-rooms, the defendant distrained for 93*l.*, arrears of rent. A formal demand of the goods being made, and a refusal to deliver them up on the ground of the right of distress, the plaintiff brought trover.

The Court said, as a general rule, all chattels, personal, found on the premises are *prima facie*, subject to be distrained; that rule, however, is not without exception. One of the exceptions is in favour of trade and commerce, and, as the landlord on the one hand, is protected under the general right of distraining, so, on the other, goods of a certain description, and in particular places, are equally protected in favour of trade and commerce. We must look to the circumstances; the plaintiff's goods were sent to his factor in London, and received by the latter in his character as such, to be either disposed of in the market or exported; and yet, on the ground of public convenience, it has been asked why did not the manufacturer sell them in the place where they were made? It is true that they might have done so; but the object for which they were sent was for the extension of trade, and it cannot be supposed for a moment that the commerce of the city of London, is to be annihilated or narrowed by persons being obliged to dispose of the different articles manufactured by them on the spot, or that they should be compelled to come personally with them to London, and that if they cannot their goods will be subject to distress. The general principle is most clearly in favour of trade and commerce, and therefore the landlord's right of distress cannot prevail against public convenience.

(d) *Innkeepers.*

The goods of a guest at an inn are exempt, Provided they be within the precincts of the inn;

1. ROBINSON v. WALTER. 3 Bulst. 269.

It was resolved that the cattle and goods of a guest at a public inn are privileged, because an inn is *publici juris*, and every man has a right to put up at it.

2. CROSIER v. TOMKINSON. H. T. 1759. K. B. 2 Kenyon, 439.

A person who was tenant to the defendant gave leave to an innkeeper to make use of his stable to put horses in during the race week. The plaintiff's race horse was brought to the innkeeper's, and by him placed in the stable, which he had borrowed from the defendant's tenant. The defendant having distrained the horse for rent arrear, the plaintiff brought trespass; but the court held the plaintiff's remedy was against the innkeeper.

[425] 3. FRANCIS v. WYATT. T. T. 1763. K. B. 3 Burr. 1498. S. C. 1 Blac. 483; abridged more fully *infra*.

And the guest's visit only temporary. It was held, that the exemption of goods from distress does not extend to the goods of a person dwelling in the inn rather as an *inmate* than a guest.

* So, corn sent to a factor for sale, and deposited by him in the warehouse of a granery-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it were deposited in the warehouse belonging to himself; see 2 C. & P. 353.

(e) Stable-keepers.

FRANCIS V. WYATT. T. T. 1763. K. B. 3 Burr. 1489; S. C. 1 Blac. 483.

In an action in replevin upon a distress for rent, the question was, whether a gentleman's chariot, which stood in a coach-house belonging to a common livery-stable-keeper, was distrainable for rent due to the landlord from the livery-stable-keeper, for this coach-house, which (together with the stables, &c.) he rented of the landlord, who distrained it. It was argued, that no protection could be claimed for this carriage, first, unless these coach-houses were considered in the nature of common inns; or, secondly, unless it is for the public convenience, and necessary advancement of trade, to protect it in a livery-yard. 1st. That they are not in the nature of a common inn, though called, in the pleadings, common and public coach-houses, since the master of them is not bound to take in horses and carriages, any more than the master of a public boarding-school is bound to receive all boarders, or a common brewer to serve all customers. 2ndly. Where goods, &c. are privileged, from necessity or public convenience, it is where it would be quite impracticable, or highly inconvenient, to dispose of, or manufacture the goods at home; so corn, sent to a mill or market, cloth to a tailor's, stuff to a dyer's, &c., are protected from any distress; and, had the plaintiff's carriage been sent to a coach-makers to be repaired, it might, for the time, have been privileged; but no necessity here: by hiring the coach-house (whether by the week, the quarter, or the year) he becomes an under-tenant, and must be liable to the landlord's distress. On the other hand, it was urged, that many things are privileged from distress, on the score of public convenience; that this was a public livery-stable, which was of great utility to the public; and if horses and carriages are not privileged therein, it will put an end to that branch of commerce. This case was twice argued; but, the Court appearing to be strongly inclined in favour of the distress, the owner of the carriage declined bringing the question to a third argument, which had been directed by the Court.

It seems, that the privilege of goods from distress at a common inn, does not extend to a livery stable keep er.

(f) Wharfinger.

THOMPSON V. MARTRITER. T. T. 1823. C. P. 1 Bing. 283; S. C. 8 Moore, 254.

In 1817, eleven tons of whalebone were consigned, by the plaintiff, to one Goods de S. C. of London, broker, as a factor or agent, for sale. The whalebone, after being landed at a public water-side wharf, belonging to one R., was placed in his (R.'s) warehouse, over the wharf, which was stated to be a public warehouse, to be there kept, at a weekly rent, till sold. In 1818, the whalebone was taken by the plaintiff from under the management of S. C., and placed by him at the disposal of D. and L. as his factors and brokers for sale, and was accordingly transferred from S. C.'s name into theirs by R. Shortly afterwards, R. became insolvent, and being then indebted to the defendants in a large sum for rent in arrear, they made a distress on his warehouse and wharf, and, together with other articles, seized the whalebone of the plaintiff, to recover which the present action was instituted.

a factor in [426] a ware house on a public wharf, are not distrainable for rent due in respect of the wharf.

Per Cur. We are decidedly of opinion that, for the benefit and convenience of trade and commerce, goods deposited under such circumstances as are disclosed in the present case, must be held not liable to be distrained for rent. The cases were all considered in *Gilman v. Elton* (*ante*, p. 423); and, though the instances put by Lord Coke are illustrative only, the general principle laid down in that decision is cogently applicable to the present.

The judgment of Lord Holt, and the facts in *Gisbourn v. Hurst*, 1 Salk. 250, apply closely to this case. He there lays it down, that goods delivered to any person exercising a public trade or appointment, to be carried, wrought, or managed, in the way of his trade or employment, are, for that time, under a legal exemption, and privileged from distress for rent; and, even with respect to a private engagement, any man, undertaking to carry for hire the goods of all persons indifferently is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier.

The factor, in this case, was agent for the owner of the goods, and, as such, deposited them in Ramsay's warehouse, so that the case, in fact, stands as if the owner himself had sent them immediately to Ramsay's; and, therefore, on the broad principle of convenience and benefit to trade, they ought not to have been distrained.—Rule discharged.

(F) WITH REFERENCE TO THINGS IN THE CUSTODY OF THE LAW.

1. PEACOCK V. PURVIS, M. T. 1820. C. P. 2 B. & B. 362; S. C. 5 Moore, 79. S. P. PARSLow V. CRIPPS. H. T. 1908. 1 Com. 204.

Property in the custody of the law cannot be distrained; hence, corn taken under a *feri facias* in the hands of the sheriff's vendee is protected from the landlord's distress* for rent subsequently accruing, unless such purchaser allow it to remain on the ground an unreasonable time after it is ripe.

The plaintiff, in Hilary term, 1819, recovered a judgment against W. P., and, on the 12th of February, sued out a *feri facias*, which was delivered to the sheriff on the 27th of April, under which, he seized the corn; that the plaintiff, after the execution, and before the removal of the corn, on the 30th of May, paid defendant one year's rent; and that the sheriff afterwards sold the corn to the plaintiff, which was, at the time when the distress was made, unripe; that on the 12th of May, another half-year's rent became due; and the defendant having distrained the same, this action of replevin was brought.

Per Cur. With respect to an execution on goods commonly denominated chattels, the duty of the sheriff is perfectly clear; he is merely to seize, sell, execute a bill of sale, and deliver the goods to the purchaser. His duty is then fulfilled, because he can deliver such goods at the moment of sale, as they may be removed without trouble or difficulty. This leads us to consider the distinction between goods which may be removed immediately, and crops of growing corn. The latter must be considered in the nature of goods, as they are liable to seizure and sale. It would be nugatory to say that a sale under such a writ would amount to satisfaction, if the right of the purchaser were to cease the moment the bill of sale is executed, and if the corn were not allowed to remain on the land until it was ripe, in order that he might reap the fruit and benefit of his purchase. It is true that, in ordinary cases, with respect to goods, the sheriff, or person purchasing them of him, is bound to remove them within a reasonable time, as the law looks to the delivery under such removal as a satisfaction of the debt. So here, the sheriff was bound to deliver within a reasonable time: but it cannot be contended that he could be so bound, until after the corn was ripe. What are the facts? The plaintiff claims these crops as a purchaser, under an execution duly issued on a judgment. It is quite clear that he can obtain no satisfaction until the corn is ripe and in a fit state to be carried away. Till then, he must be considered as being under the protection of the law. We therefore think the defendant had no right to distrain.—Judgment for plaintiff.

2. SMITH V. RUSSEL. H. T. 1811. C. P. 3 Taunt. 400.

Or the execution be fraudulent.

A rule had been obtained, calling on the sheriff to pay over to the landlord of a house in which an execution had been levied, out of the proceeds of the execution, the amount of the rent due, not exceeding one year. It appeared that the goods had been purchased under a fictitious bill of sale from the sheriff, but had not been removed from the premises. It was, therefore, objected that there was no ground for calling on the sheriff, inasmuch as the goods had never been removed by the sheriff; but, when he had completed his duty, they still remained on the premises liable to the distress. The Court allowed the propriety of the objection.

3. SEVEN V. MIHILL. T. T. 1756. K. B. 1 Kenyon. 370.

But as soon as the party has waived his execution, the landlord's right to distrain revives.

Goods being taken under a *feri facias*, whilst in *custodia legis*, the landlord took them as a distress, and actually sold them. On a rule for restoration it appeared that, after the landlord's giving notice, the plaintiff, finding that other persons laid claim to these goods, and that they were not the goods of the defendant, waived his execution, and left them at large, whereupon the landlord distrained them, and removed them off the premises.

* But the landlord is entitled to one year's rent out of all goods, &c. taken in execution; see 8 Anne, c. 14. s. 1; and *post* tit. Execution.

† As where an officer, after seizing a table under a *feri facias*, locked up his warrant in the drawer, and left the house, he was holden to have abandoned the possession, so as to let in the landlord's distress; see 1 M. & S. 711.

Per Cur. Whilst the goods were in *custodia legis*, the landlord was divested of his remedy by distress; but, as soon as the plaintiff waived his execution, the landlord's right revived. As to the property of the goods, that is a matter to be tried in an action, and not on motion. [428]

(G) WITH REFERENCE TO THE PLACE IN WHICH A DISTRESS MAY BE MADE.

(a) *In an inclosed place.** (b) *Not on the highway.†* (c) *Nor on other lands than those on which the rent is charged.*

ROGERS v. BIRKMIER. E. T. 1736. K. B. Co. Temp. Hard. 245; S. C. 2 Stra. 1040.

In an action of trespass for taking goods, the defendant justified, that he demised some tenements to the plaintiff for one term, and others for another term; and there being rent in arrear on both demises he distrained the goods. On a demurrer it was held ill, for there being separate demises, there ought to have been separate distresses on the several premises, subject to the distinct rents; and no distress on one part can be good for both rents, because this would be to make the rent of one issue out of the other; therefore the plaintiff had judgment.

The distress follows the rent; and consequently, it can only be made on the land out of which the rent is sued.

(H) WITH REFERENCE TO THE PERIOD LIMITED FOR MAKING A DISTRESS.

I. LEWIS v. HARRIS. Sum. Ass. 1788. C. P. 1 H. Bl. 7 n. S. P. BEAVAN v. DELAHAY. E. T. 1788. C. P. 1 H. Bl. 5.

In trover for wheat, the defendant justified under a distress for rent. The distress was made in March, the term having ended the Candlemas twelve months before, but it was during the time the wheat was in a barn, on part of the demised premises, and also during the time allowed by the custom of the country to the off-going tenant to get in and dispose of his off-going crop. At the trial of the cause, it was insisted for the plaintiff, that the distress was bad at common law, and not within the statute 8 Anne. c. 14. s. 7. But Skinner, C. P. was of opinion that, during the tenant's right to continue, he was immediate tenant, and could have maintained trespass. And he ruled for the defendant.

Since 8 Anne c. 14. § wherethe tenant's corn remained [429] At the premises, beyond the six months after the termination of the term

but within the time allowed by custom for the out-going tenant to dispose of his crop; it was holden distrainable.

2. BURNE v. RICHARDSON. H. T. 1813. C. P. 4 Taunt. 720.

In this case, the Court held, that a termor, who lets to an under-tenant, cannot, after his term expired, enforce the continuance of his undertaking by distress, if the under-tenant refuses to acknowledge him as landlord, and puts him under threats of distress, although the under-tenant still retains the possession.

But a termor who has underlet, cannot, after the expiration of his term, distrain on his under-tenant continuing in possession.

(I) WITH REFERENCE TO THE MODE OF CONDUCTING A DISTRESS.

(a) *In general.*

1st. *Of the demand of, and tender of, the rent.* § 2nd. *By whom.*

* A distress may be made in a house, or other enclosed place; see Brad. Dist. 136.

† A distress cannot be made on the highway, unless at the instance of the King; see Brad. Dist. 132.

‡ At common law, the landlord must have distrained for rent in arrear during the continuance of the lease; see 3 Co. Rep. 64; Bro. Dist. pl. 74; and therefore for rent due on the last day of the term, the lessor could not distrain; because the term was ended; see Co. Litt. 47. b.; unless the tenant held over; see Keilw. 96. But now, by the 8 Anne, c. 14. the distress may be made within six calendar months after the end of the lease, and during the continuance of the landlord's title or interest, and the tenant's possession.

Where the term ended at Michaelmas, but by the custom of the country the off-going tenant was entitled to continue in possession until the May day ensuing, for the purpose of threshing out and foddering; held, that the tenancy was to be deemed continuing, and that the landlord was entitled to distrain, independently of the statute 8 Anne, c. 14; 3 Bing. 368. The statute of Anne is not confined to tortious holding; 4 B. & C. 51.

§ The making a distress being considered as a legal demand, no other demand is generally requisite, unless there be a reservation requiring a special demand; hence, a clause in a lease, that the lessor might distrain; for the rent "being lawfully demanded," was holden not to require a request previous to the distress. But, where the clause was, if the rent were behind, it should be demanded at a particular place, not on the land, or be demanded of the person of the tenant, a special demand was deemed essential to support a distress; see Bac. Ab. Condition, A. 2; Hob. Rep. 208; Plowd. 69. In these cases, where a demand is necessary, it need not be made the day the rent becomes due, but at any time subsequent; see

1. *Bailiffs*.* 2. *Landlords*.† 3rd. *At what time to be made*.‡ 4th. *of the warrant*..

HIGGS v. DIXON. T. T. 1817. N. P. 2 Starkie. 180.

The warrant to distrain being attested, it was contended to be unnecessary to call the subscribing witness to prove it; but Lord Ellenborough, C. J., said, there is no reason to depart from the general practice.

5th. *Of breaking open doors, &c.*

1. BROWNING v. DAM. M. T. 1735. K. B. Ca. Temp. Hard. 167.

Per Cur. In making a distress, if the outer door of a house is open, a person may break an inner door to make a distress; and so one may on an execution.

2. GOULD v. BRADSTOCK. T. T. 1812. C. P. 4 Taunt. 562.

Trespass against a landlord, who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor, without any ceiling, for taking up the floor of his own apartment, and entering through the aperture, to distrain for rent. It was contended that, though in order to distrain, a person cannot break open the house, yet if he finds it broken, he may enter, which was the case here, for the taking was after the breaking; 9 Vin. Abr. 152; M. Pl. 2 & 7; it is said, that he shall distrain for rent, *per ostia et fenestras*. And the protection extends only to the outward shell of the house; for entering now here the defendant was already within the inner door.

Per Cur. The plaintiff does not go on the act of 11 Geo. 3. c. 19. to recover damages for any supposed irregularity; he goes on the trespass; and he must make out that these boards were the plaintiff's sole property, which they were not; after the defendant has moved the boards he can get into the house, and that without a trespass; and when he can get into the house without trespass, he may lawfully distrain. We therefore think the law is with the defendant.

6th. *Of the inventory*.††

Hob. 207. No landlord can distrain after the tenant has, upon the land, tendered the rent; see 8 Co. Rep. 147; 2 Inst. 107. And, even if the tender be made after the distress, but before impounding, the landlord is, it seems, not justified in detaining the property; see *ibid*.

* The bailiff must be authorised by a written authority from the landlord; see Brad. Dist. 217. And, if required, he is bound to show his authority; if not, he may distrain generally (see 1 Leon. 50.) by taking some article of furniture in lieu of the whole; see Brad. Dist. 216.

† The distress may be made by the person to whom the rent is due, who has no particular form to observe: he has merely to take some article of furniture in the name of all the goods on the premises; see Brad. Dist. 216.

‡ A distress cannot be made before the next day after the rent is due; see 1 Saund. 287; Co. Litt. 47. b.; and must be in the day time, that is, between sun-rising and sun-set; for a distress cannot be made in the night; Co. Litt. 142. a. But the period at which a distress may be made, depends sometimes upon the nature of the contract, and the custom of the country; therefore, where, by the custom of the country, half-a-year's rent becomes due, upon the tenant's entry on the land, a distress may be made immediately; 2 T. R. 600; Cowp. 784.

§ There is no authority to show that the bailiff must have a warrant of distress, although it is certainly the most eligible mode of appointment; see Brad. Dist. 217. The warrant need not be stamped nor sealed, although the distress be made by a corporation; see 1 Salk. 191; but it must be signed by the person entitled to the rent. And in the case of a joint distress, as coparceners, the warrant must be signed by all the persons entitled to distrain; see 1 Leon 50; 3 Taunt. 120; 3 B. & A. 689.

By 33 Geo. 3. c. 35. where distress cannot be found in the jurisdiction of the justices granting warrants, it may be levied in any other place, upon a warrant granted by other justices where the property lies; and, if no distress can be found, the offender is to be proceeded against, according to law; and, such backing justice is not answerable for irregularity.

|| Into a house or building, may enter through the doors or windows; see 1 Rol. Abr. 671.

** So, inclosures, or fences, cannot be broken to take a distress; see Co. Litt. 161. a. And, where a padlock had been put upon a barn door, it was holden, that the landlord could not break it, in order to seize the corn in the barn; see Vin. 128. pl. 6. tit. "Distress."

†† The inventory should describe the articles distrained; as, in the parlour, one table, &c. see Brad. Dist. 219.

[430]

If the warrant be attested, the subscribing witness must be called.

The party making a distress may, if the outer door be open, break the inner doors. ** And trespass will not lie against a landlord for entering a divided apartment through his own board [431] and uncoiled floor to distrain for rent.

WARD v. HAYDON. E. T. 1796. K. B. N. P. 2 Esp. 553.

Lord Kenyon, C. J. said, where a distress has been made, in order to charge a defendant, it would be necessary to prove that he had taken some part respecting the goods, or interfered with the disposition of them; but that the mere act of making an inventory, by direction of the other defendant, and drawing a notice which the other signed was not sufficient to subject him to an action.

Merely making an inventory does not so far imply cate h; maker, as to subject him to an action, if the distress be irregu

7th. Of the notice.*

1. WALKER v. RUMBALD. T. T. 1694. K. B. 12 Mod. 76.

On an action of trover for six hogs, a special verdict was found, viz. that the lands demised lying in two counties, viz. part in the hundred of A. in Wilts, lar. and part in the hundred of B. in Southampton, the lessor for rent in arrear dis- A parol trained in both hundreds, and the distress being not replevied in five days, no- notice,† tice was given to the owner of the goods, and then he sent for the constable of A., who in the presence of the constable of B., sold them in the hundred of B., after a legal appraisement.

personally given to the tenant or owner of the goods distrained,

Per Cur. Personal notice is sufficient, for notice is the thing required. 2dly. Notice to the owner is enough against him in trover, but if the tenant had brought replevin, that would not have served as to him, but he must have had notice also.

Without specifying the exact period the rent be came due will suffice.

2. MOSS v. GALLEMORE. M. T. 1779. K. B. 1 Doug. 279.

Per Cur. It is not necessary, under the statute W. & M. to set forth in the notice of distress at what time the rent became due.

8th. Of the appraisement.†

WESTWOOD v. CORINE. H. T. 1816. K. B. 1 Stark. 172.

“ In case for an irregular distress, it was admitted that the distress, having been made by the appraiser, was irregular.

The dis trainor must not be the apprais er.

9th. Of the sale.‡

1. WALLACE v. KING. E. T. 1788. C. P. 1 H. Bl. 13.

The distress was made on Saturday morning, the 12th of May, and an inventory and notice of sale given. On Thursday, the 17th, the goods were re- [432] moved and sold. After verdict for the plaintiff, in an action for selling the The five goods before the five days had expired, a rule was obtained to show cause days are in why a nonsuit should not be entered; it was contended, that the five days giv- clusive of en by the statute for the party to replevy ought to be reckoned exclusive both the day of of the day in which the distress was taken and also of the day when the sale sale, but ex clusive of the time of days made. But the Court were of opinion that on Thursday afternoon, five it. days from the time of the distress had completely expired.

* The preceding inventory should be subjoined to the notice; see Brad. Dist. 219; which notice is given previous to the sale of the goods under the 2 W. & M. left at the chief man- sion-house, or on the premises charged with the distress.

† If the notice be not personally given, it should be left in writing at the tenant's house, or according to the directions of the statute, at the chief manor-house, or other such notori- ous part of the premises charged with the rent; see Brad. Dist. 223.

‡ By the 2 W. & M. the goods distrained are to be appraised by two sworn appraisers, whom the sheriff, or under-sheriff, or constable, shall swear to appraise them truly, accord- ing to the best of their understanding. It seems questionable, whether the constable of a different parish can administer the oath; see 1 H. Bl. 13.

A written stamped appraisement is not necessary where the broker speaks of the value of the goods from recollection: see 1 Carr. & P. 25; and ante, vol. i. p. 729.

§ Distresses for rent being in the nature of pledges, the distrainer had no power to sell them, at the common law. But now, by the statute 2 W. & M. c. 5. it is enacted that, where any goods shall be distrained for rent reserved and due upon any demise lease or contract whatsoever, and the tenant, or owner of the goods distrained, shall not, within five days next after such distress taken, replevy, the same shall be sold for the best price that can be got for them.

If a landlord who has distrained for rent does not sell within the five days by arrangement between him and the tenant, that is no proof per se of collusion; see 7 Price, 690. The re- quest of the tenant will not justify the landlord in distraining the goods of a lodger beyond the five days, if he did not know which were the goods of the lodger, and which those of the ten- ant; see 2 Carr. and P. 374.

There is, however, no order required by law to be observed in the sale of goods taken under a distress, as that beasts of the plough should be postponed until the other goods are disposed of; Jenner v. Yolland, 6 Price, 3; S. C. 2 Chit. Rep. 167.

2 WINBERBOURE v. MORGAN. T. T. 1809. K. B. 11 East, 395.

And where a distrainer remained in possession of the goods in plaintiff's hands beyond the five days, and then removed them, it was holden that trespass was the appropriate form of action.

It appeared that the defendant entered under a warrant of distress for rent in arrear, and that he continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress. This was an action of trespass. A question was now raised, whether, as the original entry of the defendant and possession under the warrant of distress was lawful, and only his continuance in possession after the time allowed by law unlawful, and the statute 11 Geo. 2. c. 19. s. 19. had provided that, when any distress has been made for rent, "and any irregularity or unlawful act shall be afterwards done by the party distressing, the distress itself shall not, therefore, be deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*, but the party aggrieved by such unlawful act or irregularity shall and may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff." The action of trespass was the proper remedy.

[433]

Per Cur. All that the act meant to say was, that a party, whose entry was lawful to take a distress on the premises, should not be made a trespasser *ab initio* for any subsequent irregularity, as he was deemed to be before that act. The object of it was to separate that which he had a right to do from that which was irregular and unlawful; and therefore it meant to say, that the landlord should not be deemed a trespasser, for entering and taking the goods in the first instance, or for continuing in the possession of them on the premises for so long time as the law allowed him to continue there; but that if he continued there after that time, he would be treated as a trespasser for that which was in law a trespass, or be liable to an action on the case for such injuries as would in law subject him to that remedy by the party grieved, according to the nature of the act done by him. We admit that if he did not continue on the premises after the time allowed by him, but were guilty of an irregularity during that time, he would not be liable in trespass *quare clausum fregit*, because his continuance there for the purpose of guarding the distress would be lawful; but here he remained there after that time, and that, we think, made him a trespasser, even if he had not taken away the goods afterwards.

3. PITT v. SHEW. H. T. 1821. K. B. 4 B. & A. 208.

But a distrainer is allowed a reasonable time, after the expiration of the five days to sell the property.

It was contended, that a person after distraining goods ought immediately after the expiration of the five days, from the time of distress taken, to appraise and sell the same, pursuant to 2 W. & M. sess. 1 c. 5. s. 2.; and 11 Geo. 2. c. 19. s. 10. But the Court said, by law the landlord and those acting under him cannot sell till five days have expired. He may, however, remain more than five days upon the premises, for the purpose of selling the goods distrained. It is the province of a jury alone to say what is a reasonable time for such purpose.

10th. *Of the removal.*

GRIFFIN v. SCOTT. M. T. 1726. K. B. 2 Stra. 717; S. C. 2 Ld. Raym. 1424.

As soon as the five days have expired, the goods must be removed.*

In an action of trespass for entering plaintiff's house, and keeping possession of his goods eight days, the defendant justified under a distress for rent; to which the plaintiff replied a tender, and on a demurrer it was objected, that it ought to be pleaded with an *uncore prist*; Lutw. 591; Tho. Ent. 265; Winch. 939; Cro. Jac. 423; Salk. 622.

Per Cur. Be the replication good or bad, yet we must go back to the first fault, which is in the plea for the defendant ought to have removed the goods at the five days' end; and for the other three he is a trespasser.—Judgment for the plaintiff.

11th. *Of the surplus.*† 12th. *Of the duty of the distrainer.*

* Before the 2 W. & M. the distrainer was bound to remove the goods off the premises within a convenient time after the distress. But now, five days' time is allowed; see 6 Mod. 215; unless it is agreed between the parties that a longer period shall be given; see Brad. Dist. 223.

† Being unable to find the tenant is a sufficient excuse for not paying over the surplus to the tenant, after a levy and sale of his goods under distress. Notwithstanding the words in

1. *DOE v. MANGER*. T. T. 1703. K. B. 6 Mod. 216.

In this case it appeared that the distrainer drew beer out of one of the barrels of beer which had been distrained. Per Holt, C. J. He is a trespasser *ab initio* as to that barrel.

[434]

The thing distrained must not be used.*

2. *ETHERTON v POPPLEWELL*. H. T. 1800. K. B. 1 East, 139.

Action of trespass. The defendant was landlord of premises of which the plaintiff was tenant. He had distrained for arrears of rent; but, after having done so, had turned the plaintiff's family out of possession, and kept the key of the premises in which he had impounded the distress. A trial had been had, and a verdict found for the plaintiff, with liberty to defendant to move the Court to enter a nonsuit, if they thought the form of action incorrect.

And trespass lies against a landlord who, on making a distress for rent, turns the tenant's family out of possession, and continues in possession after the rent is paid.

Per Cur. This action of trespass is clearly maintainable; for the excess of the defendant's conduct in the subsequent part of the transaction is turning the plaintiff's wife out of possession, which she held for her husband.—See 1 Burr. 590; Fitz. 85; 2 Str. 851; 7 T. R. 654.

13th. *Of the charges to be paid to the distrainer.*†(b) *In particular.*1st. *Where the goods are already in execution.*‡

(J) WITH REFERENCE TO THE MAKING SEVERAL DISTRESSES FOR THE SAME RENT.

HUTCHINS v. WHITAKER. E. T. 1758. K. B. 1 Burr. 578; S. C. 2 Kenyon, 204. [435]

In an action for an excessive distress, the question was, whether a second distress can be justified under the same warrant, when enough might have been taken at first, if the distrainer had then thought proper.

A second distress can not be made, if enough might have been taken at first, unless the distrainer mistake the value of the goods.

Per Cur. A man who has an entire duty shall not split the entire sum, and distress for part at one time, and part at another; because that would be great oppression; if a man seizes for the whole sum due to him, and only mistakes the value of the goods seized, there is no reason why he should not afterwards complete his execution, by making a further seizure.

(K) WITH REFERENCE TO MAKING A JOINT DISTRESS FOR SEVERAL RENTS.

ROGERS v. BERKMIRE. E. T. 1735. K. B. 2 Stra. 1040; S. C. Ca. Temp. Hard. 145.

In an action of trespass for taking goods, the defendant justified that he detained 2 W. & M. c. 5. s. 2. it is the practice to pay over such surplus to the tenant, and not to the sheriff; *Stubbs v. May*, M. T. 1822. C. P. MS.

* The 11 Geo. 2. c. 19, has rendered such persons liable to an action for the abuse. And it has been held that, even using the thing distrained, so as to make it beneficial to the distress, is also an abuse; see *Cro. Eliz.* 783. Therefore, it has been said, the distrainer has no right to milk a cow, because the owner might come himself; and, if the beast sustain an injury thereby, and die, the distrainer is not liable, and he may make another distress; see *Rol. Abr.* 673.

By the 11 Geo. 2, "any person distraining may impound, or otherwise secure the distress, of what kind so ever it be, in such place, or on such part of the premises, as is most convenient." If the distress be of goods which may take harm by wet weather, or be stolen away, then he must impound them in a house, or other pound covert, within three miles, in the said county; see *Inst.* 47.

† By 2 W. & M. the charges of the distress, appraisement, and sale, are to be satisfied out of the things sold. And, by the 57 Geo. 3 c. 93. s. 1. no person, making any distress for rent where the sum shall not exceed 20*l.* to take other charges than mentioned in the schedule annexed; nor to charge for any act not done. By s. 2, party aggrieved by such practice may apply to a justice of the peace, who may adjudge treble the amount of the moneys unlawfully taken to be paid, with costs, which may be levied by distress. And, by s. 3, such justices may summon witnesses, and, if they neglect to attend, may impose a penalty on them not exceeding 40*s.* By s. 4, if complaint be unfounded, the justice may give costs to the party complained against. But no judgment to be given against any landlord, unless he personally levies the distress. And this act is not to bar parties of other legal remedies. By s. 5, the signature of the justice is directed to be attached to the judgment. And by s. 6, the brokers are to give copies of their charges, to the persons whose goods have been distrained.

‡ If the goods of the tenant are already taken under legal process, the landlord must not attempt to distress them, but must give notice to the tenant in possession of his claim for rent, under the 8 Anne, c. 13; see *Brad. Dist.* 229.

§ And if there be not sufficient on the premises, a second distress for the remainder is not illegal; see 2 *Lutw.* 1536; *Cro. Eliz.* 13; 17 *Car.* 2. c. 7.

distinct rents
cannot be
made.

mised some tenements to the plaintiff for one term, and others for another term, and there being rent in arrear on both demises, he distrained the goods. And on a demurrer, it was held ill; for there being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents; and no distress on one part can be good for both rents; therefore the plaintiff had judgment.

(L) WITH REFERENCE TO A FRAUDULENT REMOVAL:

(a) *What cases are within the statute.*

1. WATSON v. MAIN. E. T. 1798. N. P. 3 Esp. 15. S. P. doubted, FURNEAUX v. FOTHERBY. H. T. 1815. K. B. 4 Camp. 136.

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To trespass, the defendant pleaded that, after a quarter's rent was due, the plaintiff fraudulently and clandestinely removed the goods in question, in order to prevent the defendant, as landlord, from distraining them; that the defendant entered the house in which, &c. the outer door being open, in order to make a distress on the goods so fraudulently removed, and because the door in question (the same being an inner door) was shut and fastened, the defendant broke it open and seized the goods, as for a distress for the said rent *prout ei bene licuit*, &c. It was proved that on the 14th of March, before the rent became due, the plaintiff had removed his goods off the premises, to avoid the defendant's distress, but there was no proof of secrecy. Eyre, C. J. said, the 11th Geo. 2. c. 19. does not apply to this case. I am of opinion that, to bring it within the statute, it ought to appear that the goods were removed after the rent was actually due and in arrear; and secrecy must be shown, otherwise how can the removal be called *clandestine*, the word used in the statute.

2. THORNTON v. ADAMS. E. T. 1816. K. B. 5 M. & S. 38.

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of a stran-
ger.

Trespass, for entering plaintiff's premises, and levying a distress. Justification, that the defendant's tenant had fraudulently and clandestinely carried off the goods from the house of which he was tenant, to prevent the defendant from distraining, and conveyed the same to the plaintiff's premises; therefore the defendant within 30 days, entered and took the said goods. It was contended, on special demurrer, that the plea was untenable; for the statute 11 Geo. 2. c. 19, which empowers landlords to distrain and sell goods, fraudulently and clandestinely carried off the premises within 30 days, plainly extends to the tenant's goods only, and not to the goods of a stranger; for the statute says "In case any tenant shall fraudulently or clandestinely carry off his or her goods;" and, therefore, though by the common law the landlord may distrain upon the premises for rent arrear, without regard to whom the property belongs, yet, here, in order to give effect to this statutable remedy, the plea ought to show that the goods were the goods of the tenant; for otherwise the defendants are not justified in following them. On the other hand it was argued that, by coupling the 1st and 7th clauses of the act together, it was plain that the remedy of the landlord was not intended to be restrained to the tenant's goods; for the language of the 7th clause is general, "where any goods fraudulently or clandestinely carried away." But the Court held that the plea was bad.

(b) *Form of seizing such goods.*†

* By the 11 Geo. 2. c. 19. if any tenant for life, years, at will, sufferance, or otherwise of lands, or tenements, upon the demise whereof any rents are reserved, shall fraudulently, or clandestinely, convey or carry off any of his goods from such demised premises, to prevent a distress, the lessor, or any person empowered by him may, within thirty days next after conveying off, distrain such goods, wherever found, for the rent arrear, and sell and dispose of the same. To bring a case within the statute, an actual participation in the act by the tenant need not be shown; if the removal be with his privity it will suffice; see 1 D. & R. 501. And where a tenant openly and in the face of the day, and with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods, it was holden that, although the removal might not be clandestine, yet as it was fraudulent, (which was a question for the jury,) the landlord was justified, under the statute; see 1 D. & R. 33.

By s. 2. of the 11 Geo. 2. c. 19. "no landlord shall distrain any goods sold *bona fide*, and for a valuable consideration, before such seizure made, to any person not privy to such fraud."

† By the 11 Geo. 2. c. 19. s. 7. where goods fraudulently removed shall be locked up

(c) Of the penalty.

1st. By whom incurred, and how proved.

1. STANLEY V. WHARTON. E. T. 1822. Ex. 10 Price, 138.

In an action on the 11 Geo. 2. against a defendant, for aiding and assisting a tenant in removing and concealing his cattle to avoid a distress. It was contended, there was no proof of any distress having been commenced, or even contemplated; and there must be a distress in progress, or at least intended, otherwise the removal is not within the act. But the Court overruled the objection, and said it was enough to show that the rent was in arrear, and that the goods have been removed afterwards.

2. STANLEY V. WHARTON. E. T. 1822. Ex. 10 Price, 138.

In an action on the 11 Geo. 2. c. 19. against a defendant, for aiding and assisting a tenant in removing and concealing his cattle, to avoid a distress, it was proved that the rent being due to the landlord, by order of the tenant, cows were driven off early in the morning of the 2d October, a few days before the plaintiff sent to distrain, from the tenant's farm to the defendant's, who was his son-in-law. After verdict for the plaintiff, it was moved in arrest of judgment that the acts and orders of the tenant respecting the goods removed ought not to have been admitted. But the Court said, the facts which were given in evidence appear to us to have been the only means by which the fraud could be proved; and we think they prove it sufficiently satisfactory, and make out this case, by bringing the defendant within the statute. Can there be any doubt that in an affair of this sort, where a tenant calls in aid his son-in-law, for the purpose of defrauding his landlord, the evidence, which was received and is objected to, was admissible?

3. BACH V. MEATS. T. T. 1816. K. B. 5 M. & S. 200.

A creditor, with the assent of his debtor, took possession of the goods of his debtor, and removed them from the premises, for the purpose of satisfying a *bona fide* debt. The creditor took possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord would distrain. The question was, whether by these acts the creditor incurred the penalty imposed by the statute 11 Geo. 2. c. 19 s. 3. against persons assisting the tenant in removing his goods from the premises.

Per Cur. The legislature seems to have had in view a fraudulent removal by the tenant, where the object was to withdraw the property from the landlord's reach, for the purpose of securing it for his own benefit. Such an object may be accomplished either by a clandestine removal of the tenant himself, or by his procuring some other person to make a pretended purchase on the premises, and remove the property under colour of such purchase. But the statute, as it seems to me, was never meant to extend to the creditor who is seeking payment of his debt, *bona fide*. If it appeared that the tenant had urged the creditor to seek this remedy, the case might have assumed the character of fraud; but where the creditor is the first mover, and the tenant does no more than accede to an arrangement for discharging himself and satisfying the creditor, what fraud is to be imputed to him?

2d. Remedy for.

1. By application to justices.† 2. In the superior courts.

or secured in any house, barn, stable, outhouse, yard, close, or place, the landlord or his bailiff, may break open, seize, and distrain them, first calling to his assistance the constable or other peace officer; and in the case of a dwelling-house oath being first made before a justice of the peace, of a reasonable cause to suspect that such goods are concealed therein.

* Cap 19. s. 3. which enacts, that if any person, &c. shall wilfully and knowingly aid or assist in such fraudulent conveying away or carrying off any part of the tenant's goods, &c. or concealing the same, every person so offending shall forfeit double the value of the goods so carried off or concealed.

† By 11 Geo. 2. c. 17. s. 4. if the goods fraudulently removed or concealed exceed not the value of 50l. the landlord may have recourse to two justices, who shall examine, &c. and then adjudge the offender &c. to pay double the value of the goods; and if the offender refuse, they shall by their warrant, levy the same by distress; and for want of such distress, commit the offender to hard labour for six months. On an order and adjudica-

[437]

In an action on 11 Geo. 2.* it need not be proved that a distress was in contemplation: showing that rent was in arrear at the period of the removal, will suffice.

And in an action for such aiding, &c. the acts of the tenant are admissible evidence of the fraud.

But a *bona fide* credit or does not, even altho' aware of his debtor's insolvency, and that he is apprehensive of a distress, incur [438]

the penalties imposed by 11 Geo. 2. c. 19. s. 3. by removing with his debtor's assent goods from the premises, for the purpose of satisfying his debt.

STANLEY v. WHARTON. E. T. 1822. Ex. 10 Price, 138. S. P. HORSEFALL v. DAVEY. 1816. C. P. Holt, N. P. C. 147.

The summary jurisdiction given to magistrates under the 11 Geo. 2. does not oust the courts of law of their jurisdiction. In an action on the 11 Geo. 2. for a fraudulent removal in arrest of judgment, that the plaintiff should have applied to two justices of the peace for summary process, the goods being under the value of 50*l.*, and that the fourth section of the statute had the effect of confining the remedy in such cases to the application to magistrates, and had ousted the courts of law of jurisdiction. But the Court said, we are of opinion, that under the 11 Geo. 2. the landlord has an option, where the value of the goods removed does not exceed 50*l.* whether he will proceed by action of debt in either of the courts at Westminster, upon the 3d section, or by summary application to two or more justices of the peace, under the fourth section, as he shall think most proper, according to particular circumstances of his case. This is clearly a proper suit to be carried into a court of law, rather than to be referred to the summary jurisdiction of the magistrates; for if there be a question of difficulty which we are now called upon to determine, what can be a greater proof than that a court of law ought to determine it with the aid of a jury, and not the magistrates in the county, without any assistance?

[439]

3. *Appeal from justices of the peace to sessions.**

(d) *Of pleading the clandestine removal.*

1. VAUGHAN v. DAVIS. M. T. 1794. N. P. 1 Esp. 257. S. P. FURNEAUX v. FOTHERBY. H. T. 1815. K. B. 4 Campb. N. P. 136.

A party distraining off being in arrear, he clandestinely removed the goods in question from P. to N. the premises under the 11 Geo. 2. c. 19. s. 1. is not entitled to give the special matter in evidence under the general issue. The plaintiff was tenant to the defendant of certain premises at P.; the rent being in arrear, he clandestinely removed the goods in question from P. to N. where the defendant had followed them and seized them as a distress for the rent in arrear, within thirty days, allowed by 11 Geo. 2. c. 19. These facts the defendant sought to give in evidence under the general issue in an action of trespass for the goods. The 11 Geo. 2. c. 19. s. 21, which enacts "that to any action brought against any person entitled to rent or services, or other persons, relating to any entry on the premises chargeable with such rent or services, or to any distress or seizure, sale, or disposal of any goods thereupon it shall be lawful for the defendant to plead the general issue, and to give the special matter in evidence, was relied on. But Rooke, J., said: this case is not within the statute. The statute is confined to the case of an entry on the premises chargeable with the rent; and to a distress and seizure of goods on the premises; whereas, the seizure here was not made on the premises, but after their removal.

2. REES v. SMITH. H. T. 1816. K. B. 2 Stark. 31.

And where there is the general issue, and special pleas stating such clandestine removal, the plaintiff ought to go into the whole of his case in the first instance. To trespass the defendant pleaded the general issue, and also special pleas, alleging a fraudulent and clandestine removal, to avoid a distress. On which the plaintiff, in his replication, took issue. The plaintiff made a *prima facie* case of trespass. The defendant gave evidence showing a fraudulent removal. On the question whether the plaintiff could afterwards prove that the removal was not clandestine, Lord Ellenborough, C. J., said: if the defendant adduce a new fact, the plaintiff may give evidence in answer to it; but the fact must be a specific new one, otherwise the plaintiff cannot go into general evidence in reply to the defendant's case. Here all the circumstances were in issue and the removal might have been proved to have been *bona fide* in the first instance. It is not, therefore, competent to the plaintiff to enter into such evidence now.

(M) WITH REFERENCE TO DISTRAINING WHERE NO RENT IS DUE.†

tion, under that statute, for clandestinely and fraudulently removing goods, under 50*l.*, to prevent distress for rent, held that such goods need not be specified in the order, it was sufficient for the justices to find their value; see 6 D. & R. 343.

* By 11 Geo. 2. c. 19. s. 5. & 6. persons aggrieved by order of such justices may appeal to the next quarter sessions, who may give costs to either party, and whose determination shall be final, provided that, where the party shall enter into a recognizance, with sufficient surety, in double the sum ordered to be paid, with condition to appear at the quarter sessions, such order shall not be entered against him in the mean time.

† By 2 W. & M. sess. 1. c. 5. if any distress and sale shall be made for rent in arrear and due, when none is in truth due, the owner shall recover double value with costs.

IX. FOR PORT DUES. See tit. Port Dues.

[440]

X. FOR SERVICES, SUITS, AND RELIEFS.

- (A) OF FEALTY.* (B) OF HERIOTS.†
 (C) OF COURTS LEET. See tit. Manor.
 (D) OF THE COURTS BARON. See tit. Manor.
 (E) OF THE CUSTOMARY COURT. See *ante*, vol. vi. p. 508.
 (F) OF COPYHOLD SERVICES. See tit. Copyhold, vol. vi. p. 508.
 (G) OF RELIEFS.‡

XI. FOR TAXES. See tit. Taxes.

XII. FOR TOLLS. See tit. Tolls.

XIII. EXCESSIVE.§

[441]

(A) ACTION FOR.

(a) *When maintainable.*

1. FIELD V. MITCHELL. M. T. 1807. K. B. N. P. 6 Esp. 71.

To prove an excessive distress, it was shown that 7*l.* only being in arrear, the distress was made, and goods taken, which were valued at 30*l.*, but which in fact, sold for 10*l.* only. It was contended, that it would be extremely hard to subject a party to an action, for taking goods where so trifling an excess in value only appeared. Lord Ellenborough, C. J. It is not for every trifling excess that action is maintainable. It must be disproportionate to some excess. There is a distinction between cases where one article can only be taken and where several can be taken. If there be but one thing which can be taken, so that it must be distrained, or the party must be without his remedy, though it considerably exceeds the sum due, still no action lies. But, if there be several things distrained which appear to be much more than sufficient, the party may resort to this action for an excessive distress.

2. CLARKE V. TUSKET. T. T. 1689. C. P. 2 Vent. 183.

It was resolved that, as a man cannot sever a distress, a horse and cart may be distrained for a small demand.

(b) *Form of.*

1. HUTCHINS V. CHAMBERS. E. T. 1758. K. B. 1 Burr. 578; S. C. 2 Kenyon.

204. S. P. LYNNE V. MOODY. M. T. 1729. K. B. 2 Stra. 851.

In an action of trespass for an excessive distress, the Court said: we are

* To fealty, a distress is not only incident of common right, but absolutely inseparable from it; see Co. Litt. 151. b.; unless by the act of law; see *ibid.* 153. a.

† For heriot custom the lord may seize, but cannot distrain; for heriot service the lord may distrain or seize, at his election; see 8 Hen. 7; Bro. Heriot. 7; Plowd. 96. a.; Cro. Car. 260; Cro. Eliz. 32. But the latter remedy can only be resorted to where the heriot can properly be deemed a service rather than a rent; see Brad. Dist. 146.

‡ If the relief be by the common law, or by special reservation, the remedy by distress follows of course; but it is said that, for relief by special custom, distress is not warranted without a prescription; see Harg. note (2); Co. Lit. 93. a.

§ Distresses ought not to be excessive, but in proportion to the duty distrained for. By 51 Hen. 8, stat. 4, it was enacted that, "distresses should be reasonable after the value of the debt or demand, and by the estimation of neighbours and not by strangers, and not outrageous." And by the statute of Marlbridge, 52 Hen. 3, c. 4, and confirmed by 28 Edw. 1, stat. 3, c. 12, it is provided that "distresses shall be reasonable and not too great; and that he who taketh great and unreasonable distresses, shall be grievously amerced for the excess of such distresses;" hence, if the lord distrain two or three oxen for 12*d.* it is unreasonable. So if he distrain a horse or an ox for a small sum, it is excessive, unless there be no other distress on the land; see 2 Inst. 107; and the tenant does not, by entering into an agreement with the landlord respecting the sale of the goods seized, waive his action for an excessive distress; 2 B. & C. 821; 4 D. & R. 539.

There can be no remedy on the statute of Marlbridge, where there is a remedy at the common law; nor if the plaintiff has recovered in replevin, can he afterwards bring an action on that statute; for an action on that statute is founded on there being a cause of distress, of which the recovery in replevin shows there was none; moreover, in replevin, damages were recoverable for the taking; and a man shall not be permitted to say there was a cause of distress, after he has recovered upon the ground of its being unlawful; see Gilb. Dist. 68.

To constitute an excessive distress, it must be disproportionate and is not proved by showing that one article greatly exceeds the amount due has been taken. Hence, a horse and cart may be distrained for a small sum, because they are not severable. Case, and not trespass, lies

for an excessive distress.*

[442]

Though the tenant has tendered the rent previous to the levying of the distress.

all of opinion, according to *Str.* 851. that trespass will not lie, but case on the statute of Marlbridge.

2. *BRANDSCOMB V. BRIDGES*. II. T. 1823. K. B. 1 B. & C. 145; S. C. 2 D. & R. 256.

The goods of the plaintiff were distrained for rent arrear, after the amount had been tendered. This action (on the case) was instituted for an excessive distress. It was contended that the action should have been trespass.

Sed per Cur. Supposing that trespass would lie, still the plaintiff was at liberty to waive the trespass, and bring an action on the case. It has frequently been decided, that trover will lie after a wrongful taking, and that is a stronger case; for there the goods are, by the pleadings, stated to have come lawfully into the defendant's possession.

3. *CROWTHER V. RAMSBOTTOM*. E. T. 1798. K. B. 7 T. R. 654.

And in trespass for distraining goods, the defendant may justify under legal process, although the distress be excessive, because the action ought to have been case.

In trespass for breaking the plaintiff's cow-house, and taking away three cows. Pleas:—1st. Not guilty. 2nd. A justification under a precept to attach the plaintiff by his goods. Replication: that the defendants, of their own wrong, broke, entered, and carried away, &c. On this issue was joined; from the evidence, it appeared that the defendants entered the cow-house while the plaintiff's servant was milking; that one of them knocked her down, overturned the milk-pan, and drove away three cows; upon being asked what they took the cows for, the defendant said he was a sheriff's officer, and had come for the cows for 7*l.* debt and 5*l.* costs, and he showed his warrant. On the same day that the cattle were taken, the plaintiff's attorney tendered them 2*s.* 6*d.* and demanded to have them restored. As the usual practice in these cases was to attach the party, in order to compel an appearance by any small chattel, and to return it on paying 2*s.* 4*d.* The cows were not returned till the fourth day. The judge left it to the jury to say whether the defendants entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt and the costs; and the jury found a verdict for the plaintiff, with 20*l.* damages. A new trial was moved for on two grounds: 1st, because the verdict was against law and evidence; 2ndly, because the evidence received of the tender of money by the plaintiff after taking the cattle, was not relevant to the issue.

Per Cur. A man is not obliged to justify a distress for the cause which he happened to assign at the time it was made; if he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service. Here the defendants were justified, under the process of the county court, in entering upon the plaintiff and taking his goods, in order to compel an appearance; and, therefore, the question ought not to have been left to the jury to say whether they entered for that or some other cause. Now, that very question was left to the jury in this case, which was there stated to be immaterial; for it was not material to inquire what the defendants said, when they entered and seized, but only whether they had, in fact, a legal warrant to justify them. Then, as to the excess of the distress taken, an action on the case lies for that, on the statute of Marlbridge; but that will not warrant an action of trespass. This question was considered in the case of *Hutchins v. Chambers* (*ante*, p. 442.), and the rule was then settled, though it was said there was an excepted case, namely, where gold or silver was taken to an excess; but that went on the ground, that gold or silver were of certain known value, and the measure of the value of other things; here, the verdict having proceeded on a mistake of the law, there must be a new trial.—Rule absolute.

[443]

A declaration in an action for excessive distress was held bad, the premi

(c) *Declaration.*

HARRIS V. COOKE. M. T. 1818. C. P. 2 Moore, 587.

Action for an excessive distress. The premises were laid to be in the pa-

* In an action, containing counts on the statute of Marlbridge for an excessive distress, and also in trover, held that, as to the dist., it could only be sustained in case of a complete distress; but, if the distress was wrongful, it might be waived, and the plaintiff proceed on the count in trover: see 1 Carr. & P. 28.

rish of St. George the Martyr, Bloomsbury. Proof was adduced that they were in the parish of St. George's, Bloomsbury. This was relied upon as an objection; and a nonsuit was accordingly entered. The Court now refused a rule to set it aside.

Bloomsbury, instead of St. George's, Bloomsbury.

(d) *Evidence.*

FIELD V. MITCHELL. M. T. 1807. K. B. N. P. 6 Esp. 71.

In an action on the case for an excessive distress, it was contended that, to support this action, the taking must appear to be malicious. But Lord Ellenborough, C. J., said, that express malice is not necessary to the maintaining this action, nor need it be proved.

In case for an excessive distress, express malice need not be proved.*

(e) *Witnesses.*

FIELD V. MITCHELL. M. T. 1807. K. B. N. P. 6 Esp. 71.

To prove a distress not excessive, the broker who made the distress, and by whom the goods were sold, was called as a witness; he not being released, his competency was objected to. Lord Ellenborough, C. J. said, by law, he was bound to do it properly; therefore, if there were anything wrong in it, or he has exceeded his duty, he will be answerable over to the defendant who employed him; consequently, he must have a release to admit him a witness.

That a distress was not excessive cannot be proved by the broker who distrained, unless released.

(B) INDICTMENTS AND INFORMATION FOR.

THE KING V. LEGINHAM. E. T. 1667. K. B. 1 Mod. Rep. 71; S. C. 1 Vent. 97. 104; S. C. Freem. 224; S. C. Raym. 193; 205; S. C. 1 Lev. 299; S. C. 2 Keb. 687. 697.

This was an information against defendant, for taking unreasonable distresses of several of his tenants. It was contended, in arrest of judgment, that it would not lie, and the statute of Marlbridge was cited. *Per Cur.* It has been held that, to lay an information that a man is *communis oppressor et perturbator pacis* is too general. Besides, the proper remedy is by special action on the statute of Marlbridge, c. 4. Trespass *vi et armis* will not lie; nor will an information or indictment. See 1 Keb. 278. 2 id. 697. 1246; 1 Lev. 203. 209; 1 Vent. 108; Raym. 205; 2 Stra. 369. 849. 851; 1 Salk. 382; 1 Sid. 62. 282; 6 Mod. 178. 289. 311; 7 id. 52.

Indictments or informations will not lie for making an excessive distress.

XIV. IRREGULAR.

1. WALLACE V. KING. E. T. 1788. C. P. 1 H. Bl. 13.

In an action on the case for an irregular distress, with a count in trover; the Court were of opinion, that trover would not lie, it not being a remedy which could be pursued since the statute of 11 Geo. 2. c. 19. as it tended to place the landlord in the same situation as before the passing of the act, by considering him as a trespasser *ab initio*.

Case, and not trover, is the appropriate remedy for an irregular distress.†

2. SHIPWICK V. BLANCHARD. E. T. 1795. K. B. 6 T. R. 298.

This was an action of trover for certain goods brought to try the bankruptcy of A. B., who was the landlord of the plaintiff of the house she inhabited. The defendant was assignee under the commission. At the trial, it appeared that C. D., by order of the defendant, as assignee, entered the plaintiff's house, and distrained her goods, for rent in arrear to the bankrupt. He de-

Unless the party pay money to redeem his goods so irregularly

* Nor need the plaintiff prove the precise amount of rent due; see 1 Bing. 401.

† At common law, the many particulars which attended the taking of a distress rendered it a hazardous mode of proceeding: for, if any one irregularity was committed, it vitiated the whole distress, and the distrainer became a trespasser *ab initio*. But now, it is provided by 11 Geo. 2. c. 19, that, where any distress shall be made for any kind of rent justly due, and any irregularity, or unlawful act, shall be afterwards done by the party so distraining, or by his agent, the distress itself shall not be therefore deemed unlawful, nor the party making it be deemed a trespasser, *ab initio*; but the person aggrieved by such unlawful act, or irregularity, may recover full satisfaction for the special damage thereby sustained, and no more, in an action of trespass, or on the case, at the election of the plaintiff, provided that where the plaintiff shall recover in such action, he shall be paid his full costs of suit, and have all the like remedies for the same, as in other cases of costs: provided also that no tenant or lessee, shall recover, in any action, for any such unlawful act or irregularity, if tender of arrears hath been made by the party distraining, or his agent, before such action brought; and in actions against persons entitled to rents, the defendant may plead the general issue; and, if successful, shall have double costs.

distrained, then trover lies against the wrong doer. [445] clared this to the plaintiff at the time of the seizure, and gave her a written notice to that effect. The plaintiff, to redeem her goods, paid him 5*l.* and 10*s.* for the expenses. It appeared further, that the debt of the petitioning creditor accrued and became due after the reputed acts of bankruptcy of G. It was objected, that this did not amount to a conversion. But inasmuch as it appeared that the distress made by the defendant, under the assignee of the bankrupt, was illegally made, because he was not the legal assignee, the Court were of opinion that the action might be maintained.

XV. WAIVER OF.

1. *PALFREY v. BAKER.* H. T. 1817. Ex. 3 Price, 572.

Taking a bond, or bill, or note, for rent, is not a waiver of the right to distrain; therefore, where a landlord withdrew a distress on receiving a note as a security, and afterwards made a second distress for subsequent rent, it was holden he was bound to apply the produce of such distress in discharge of the note. The defendant had joined one B. in a note, which was dated 23d of April, 1814, on occasion of the plaintiff having distrained on B. for rent due to him, and costs of distress, in order to prevent a sale. In August, 1815, plaintiff distrained again for subsequent rent, when the goods were sold. The amount of the sale was more than sufficient to satisfy the note, part of which had been paid. In an action against the defendant on the note, it was contended that the plaintiff might use his higher remedy for the rent subsequently due, and resort to the security for the former rent. But the Court said, the note did not, till paid, discharge the rent, or destroy the landlord's higher security, nor would it if it had been a bond. The goods taken under the first distress were not sold. The plaintiff, instead of proceeding to sale, as he might have done, agreed, *pro hac vice* to take the defendant's note, and, whilst that note was unpaid, his remedy by distress remained. The plaintiff made a second distress the next year, and under that he received more than enough to pay the rent for which the note was given. He received the rent from the tenant, by resorting to his highest remedy, and having so received it, he discharged his tenant, as far as the amount proved to be, and so far also his collateral security. See Com. L. & T. 350; Bull, N. P. 182.

2. *SHERRY v. PRESTON.* M. T. 1813. K. B. 2 Chit. Rep. 245.

So, the right of distress is not taken away by an agreement to have given him. The landlord had right at any time to determine his forbearance, and distrain. A distress had been taken for rent in arrear. It appeared that an agreement had been made to receive interest on such rent. This, it was urged, determined the right to distrain. *Per Cur.* There is here no suspension of the distress. It is only an agreement by the landlord for that which the law would have given him. The landlord had right at any time to determine his forbearance, and distrain.

3. *LEERY v. GOODSON.* E. T. 1792. K. B. 4 T. R. 687.

But a landlord, who abandons a distress on an agreement by a third person to pay the rent, must declare specially. Submitting to a distress is an acknowledgment of the tenancy. The plaintiff having distrained the goods of his tenant, the defendant, in consideration that he would return them to the tenant, undertook to pay, &c. which, however, he having neglected to do, the plaintiff brought an action for money had and received, to recover the value of the goods. But the Court held, that the plaintiff could not recover upon that count.

XVI. EFFECT OF.

PANTON v. JONES. Spring Ass. 1813. 3 Campb. 372.

In an action for use and occupation, as evidence of a title, it was proved that the defendant being in possession of the premises she distrained, for arrears of rent; that the defendant did not replevy, and the goods were sold. It was contended, that the submission to the distress was no acknowledgement of the tenancy. But Bayley, J., said, he entertained a different opinion.

XVII. OF THE ACTION TO RECOVER BACK MONEY GIVEN TO RELEASE PROPERTY ILLEGALLY DISTRAINED.

LINDON v. HOOPER. H. T. 1776. K. B. Cowp. 414.

An action for money had and received does. On a rule to show cause why a new trial should not be granted, it appeared that this was an action for money had and received, brought by the plaintiff against the defendant, who had distrained the plaintiff's cattle. The plaintiff insisted he had a right of common, and demanded his cattle to be restored,

which the defendant refused to do, unless the plaintiff would pay him 20*l.* for the damage done. Upon this, the plaintiff paid the money in dispute for the release of his cattle; and the action was brought for that money. At the trial, the plaintiff was nonsuited, on the ground that it should have been either replevin or trespass. *Per Cur.* After a cause is brought before the jury, an attempt to turn the plaintiff round, if the merits can be fully and fairly tried in the action brought, is viewed unfavourable; yet, if founded in law it must prevail. The present case is singular, and depends upon a peculiar system of strict positive law. The law has provided two precise remedies for the proprietor of cattle which happen to be impounded. 1st. He may replevy; and, if he does, upon the avowry, he must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken. 2nd. If he does not choose to replevy, but is desirous to have his cattle immediately redelivered, he must make amends, and then bring an action of trespass for taking his cattle, and particularly charge the money so paid by way of amends, as an aggravation of the damage occasioned by the trespass. If, to such an action, the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges the cattle had to be there. If, instead an action of trespass, an action to recover back the money so paid by way of amends might be brought, at the election of the plaintiff, the defendant would be laid under a great difficulty; he might be surprised at the trial; he could not be prepared to make his defence; he could not tell what sort of right of common, or other justification, the plaintiff might set up. Rule discharged.

XVIII. OF PLEADING A DISTRESS.

[447]

LEES v. WRIGHT. E. T. 1822. K. B. 1 D. & R. 391.

To a declaration in *assumpsit*, for coals taken from plaintiff's pit, for use and occupation of a coal-pit, and the common counts; it was pleaded, that plaintiff had distrained defendant's goods for the same identical cause of action. Demurrer, that it did not appear by the plea, that all plaintiff's damages, by reason of the defendant's non-performance of the said promises and undertakings, were satisfied. It was contended, for the defendant that, as the plaintiff had elected to distrain, he was estopped from supporting his penal action, if the distress were not sufficient to satisfy the demand.

The Court said, that the case cited 1 Salk. 248. in support of such position was one where the law conferred a right of distress; but that they never heard of distraining for goods sold and delivered, money lent, or money paid; and intimated that, even allowing a right of distress to exist, under the circumstances before the Court, yet that if a distress were made, to the amount of 20*l.*, and the debt amounted to 500*l.*, it could scarcely be successfully contended, that the party is thereby excluded from adopting any remedy for the recovery of the remainder of his debt; in other words, the present plea is no answer to the action; and judgment must be given for the plaintiff on demurrer.*

XIX. OF RESCOUS AN POUND BREACH. See tit. Rescous and Pound Breach.

XX. OF REPLEVYING DISTRESSES. See tit. Replevin. Distribution, Statute of.

I. IN GENERAL.

- (A) TO WHAT PROPERTY APPLICABLE, p. 448.
- (B) WHEN TO BE MADE, p. 448.
- (C) OF THE PERSONS ENTITLED TO, p. 448.
- (D) BY WHAT TRIBUNAL TO BE ENFORCED, p. 450.

II. IN PARTICULAR.

- (A) BY THE CUSTOM OF LONDON, p. 450.
- (B) ———— YORK, d. 450.

III. OF ADVANCEMENT.

* Permission to amend was refused.

(A) IN GENERAL, p. 451.

(B) IN PARTICULAR.

(a) By the custom of London, p. 451.

(b) ————— York, p. 452.

[448]

I. IN GENERAL.*

(A) TO WHAT PROPERTY APPLICABLE.

OLDISON v. PICKERING. M. T. 1695. K. B. 3 Salk. 137; S. C. Carth. 376; S. C. 1 Ld. Raym. 96.

An estate
per autre
vie is not
distributa-
ble.†It was adjudged that, though an estate *per autre vie* is made assets by the 29th Car. 2., yet it is not distributable within the 22d Car. 2. for distribution of intestate's estates, because it remains a freehold.

(B) WHEN TO BE MADE.‡

(C) OF THE PERSONS ENTITLED TO. §

1. BLACKBROUGH v. DAVIS. H. T. 1699. K. B. 12 Mod. 619.

Sisters;

Per Cur Sisters and brothers are in an immediate degree to one another.

[449]

2. PALMER v. ALLICOCK. H. T. 1683. K. B. 3 Mod. 58; S. C. 2 Show. 407; S. C. Comb. 14.

And broth-
ers, on the
death of
their fa-
ther, a wid-
ower, take
equally.

It was stated by Counsel, and not denied by the Court, that if a man die intestate, leaving two sons and no wife, each have a moiety of his personal estate immediately vested in him, under the 22d and 23d Car. 2. c. 10.

Even tho'
some be of
the half-
blood,||

3. TRACY v. SMITH. T. T. 1675. K. B. 2 Lev. 173; S. C. 1 Mod. 209; S. C. 2 Mod. 205.

On prohibition, it appeared one died, having brothers A., B., and C., of the whole blood, and D., E., and F., of the half blood. Rainsford and Wild, Justices, seemed to think that a brother of the half blood is a brother, as well as a brother of the whole blood, and therefore that a brother of the half blood shall share equally with one of the whole.

* At common law, the intestate's personal property was distributed by the ordinary, according to his conscience, to pious uses; see 3 Mod. 58; S. C. 2 Show. 407; S. C. Camb. 14; But now, by the 22 and 23 Car. 2, c. 10, it is enacted, that all ordinaries, and other persons, by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates among the deceased's relatives, provided that this act shall not anyways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them.

† All personal property of which the deceased has made no testamentary disposition is distributable.

‡ By 22 and 23 Car. 2, c. 10, s. 8, it is enacted, that no such distribution of the goods of any person so dying intestate shall be made till after one year be fully expired after the intestate's death.

§ By 22 and 23 Car. 2, c. 10, and 29 Car. 2, c. 10, one-third of the intestate's estate shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants. If there are no children, or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred of equal degree, and their representatives. If no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin, in equal degree, and their representatives. The next of kindred here referred to are to be investigated by the rules of consanguinity as those who are entitled to letters of administration. And therefore, by this statute the mother, as well as the father, succeeded to all the personal effects of their children, if he be intestate, and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father, but by statute 1 Jac. 2, c. 17, if the father be dead, and any of the children the intestate, without wife or issue, in the life-time of the mother, she, and each of the remaining children, or their representatives, shall divide his effects in equal proportions; see 2 Bla. Com. 515.

By 29 Car. 2, c. 3, it is declared, that neither the 22 and 23 Car. 2, nor any thing therein contained shall be construed to extend to the estates of feme coverts that shall die intestate; but that their husbands may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the act.

|| And a posthumous child, born within the year after the decease of the intestate, takes equally with one born before; see 2 Freem. 230. So the females of the mother's side take along with the males of the father's side, when the same degree of proximity to the intestate; see 1 P. Wms. 53. Whether the next of kin be of the half or the whole blood; see 11 Vin. Abr. 91.

4. CALDICOT v. SMITH. E. T. 1682. K. B. 2 Show. 286.

The 22 Car. 2. c. 10. says, "that there shall be representatives of collaterals only to brothers' and sisters' children." The question was, whether it should be intended of brothers' and sisters' children of the party intestate, or of the administrator? The Court held that it should be only of the former.

5. PETT v. PETT. M. T. 1695. K. B. 1 Salk. 138.

On stat. 22 and 23 Car. 2. c. 10. the question was, whether the brother's grandson should have a share with the daughter of the sister of the intestate? The words of the statute are, "provided no representatives be admitted among collateral after brothers' and sisters' children." *Per Cur.* There shall be no distribution among collaterals after brothers and sisters of the intestate; for that statute is a restraint on the common law, and therefore shall not be carried farther than the latter.

6. BLACKBOROUGH v. DADIS. H. T. 1699. K. B. 12 Mod. 619.

The Court agreed that an aunt could by no means be said to be nearer of kin than the grandmother.

7. BROWNE v. SHORE. T. T. 1688. K. B. 1 Show. 25; but see PALMER v. ALLICOCK. H. T. 1688. K. B. 3 Mod. 56; S. C. 2 Show. 407; S. C. Camb. 14.

The declaration in prohibition stated, that J. S. died intestate; that A. and B. were his next of kin; that A. died within a year after J. S., and before any actual distribution; that the executors of A. sued for their part, &c. On demurrer, the question was, whether the 22 Car. 2. vested such an interest in the party, upon the death of the intestate; that if he die before distribution, it shall go to his executors? The Court inclined to the affirmative.

(D) BY WHAT TRIBUNAL TO BE ENFORCED.

1. ANON. M. T. 1760. K. B. 1 Salk. 566. S. P. HUGHES v. HUGHES. H. T. 1667. K. B. 1 Lev. 233; S. C. Carter, 125.

Holt, C. J. There never is a distribution ordered by the Ecclesiastical Court, but where the party dies intestate, or the will directs it; but Chancery does sometimes enforce a distribution where the will does not direct it, will, the Court of Chancery, and not the Ecclesiastical Court, orders distribution.

2. PETIT. v. SMITH. T. T. 1696. K. B. 1 Ld. Raym. 86.

Per Cur. The Spiritual Court cannot compel distribution, but where the party dies intestate.

II. IN PARTICULAR.

(A) BY THE CUSTOM OF LONDON. See *post*, tit. London.

(B) BY THE CUSTOM OF YORK.†

III. OF ADVANCEMENT.

* With uncles, nephews, and nieces, see 1 Kenyon, 296. And if there be no other descendant, the grand-father takes one-half with the widow of the deceased; see Mascall, 85. So, if there be no other descendant, the great grand-fathers and great grand-mothers take equally with aunts, uncles, nephews, and nieces. And if there be no other descendants, great great grand-fathers and mothers take equally with great great uncles; aunts, first cousins, great great nephews, and nieces; see Mascall, 86. But grand-fathers, though equal in degree of consanguinity, shall have no share with the brother of the deceased; see 3 Atk. 762. And a father-in-law, and mother-in-law, take nothing, for they fall within the principle, that affinity or relationship by marriage, except in the case of the wife of the intestate, gives no title to a share of his property; see Mascall, 62.

† If a man be an inhabitant or householder within the province of York and dying there or elsewhere intestate, and at the time of his death hath a wife, and also a child or children his goods shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the 3d part (which is called the death's or dead man's part) is distributable by the stat.; of which dead man's part, by the statute, the wife shall have one-third, and the other two-thirds shall be distributed amongst the children; so that, dividing the whole into nine parts, the wife shall have four, and the children five. But if by settlement a jointure is limited to the wife, in bar of all her demands, out of the personal estate of her husband, by virtue of the custom, in such case it is as if there were no wife with respect to the customary part; so, if it is in bar of all her demands, by virtue of the said custom, or otherwise, she shall be debarred also of any distributive share by the statute; see 1 Vern. 15. And, as to the children, if the intestate hath a wife, and child or children, which child is heir to the intestate, or which children were advanced by the father in his life-time, in this

(A) IN GENERAL.*

(R) IN PARTICULAR.

(a) *By the custom of London.* See post, tit. *London*.

[452]

(b) *By the custom of York.*†**Distringas.**

I. IN WHAT CASES AVAILABLE, p. 452.

II. AGAINST WHOM IT LIES.

(A) JURORS, p. 457.

(B) PEERS AND MEMBERS OF PARLIAMENT, p. 457.

(C) SHERIFFS, p. 457.

III. OF THE AMOUNT TO BE LEVIED, AND THE RETURN AND SALE OF THE ISSUES, p. 457.

IV. OF THE COSTS ON, p. 458.

V. OF THE TESTATUM DISTRINGAS, p. 458.

VI. AMENDMENT OF, p. 459.

I. IN WHAT CASES AVAILABLE.

case it is as if he had no child, and therefore his goods shall be divided into two parts, whereof the wife is to have one part to herself, and the other half is distributable by the statute; see Swinb. 220; Lev. on Wills, 114.

If the intestate hath neither wife nor child at the time of his death, his personal property shall be disposed of in the course of administration, as falling within the statute of distributions.

As to the child's being excluded as being heir, he will be totally barred from receiving any part thereof by the custom, if he should have any real estate by descent or otherwise from his father.

In case a freeman of London shall die within the province, the custom of the city for the distribution of his effects shall prevail, and shall control the custom of the province of York; for the custom of the province is only local, and, circumscribed to a certain district, but that of London follows the person, although ever so remote from the city; see 4 Burn. E. L. 416.

* An advancement is a provision made by a father in his life-time, by such an act; see P. Wms. 440; as divests the child of all claim to personal property in its father's possession after his death; see 2 P. Wms. 445; hence, if a father purchase for a son an advowson, or any other ecclesiastical benefice; or if he buy him any office, civil or military, these are held to be such advancements, either partial or complete, according to the comparative value of the estate to be distributed; see 3 P. Wms. 317. So, a provision made for a child by a settlement, either voluntary or for a good consideration, as that of marriage, is an advancement pro tanto; see 2 P. Wms. 440; 2 Vern. 638.

It is not necessary that the advancement should take place in the father's life-time; see 2 P. Wms. 440; and were it only contingent, yet, when the contingency has happened, it shall be considered an advancement; see P. Wms. 442. But the contingency must be so limited as necessarily to arise within a reasonable time, as where the portion was secured for the daughter, on her attaining the age of eighteen, or on her marriage; see 2 P. Wms. 440. A child advanced in part, shall bring in her advancement only among the other children, for no benefit shall accrue from it to the widow; see 3 Bac. Abr. 77. If a child, who has received any advancement from his father shall die in his father's life-time, leaving children, such children shall not be admitted to their father's distributive share; unless they bring in his advancement, since, as his representatives, they can have no better claim than he would have had if living; see 2 P. Wms. 560.

By this statute, although the heir at law shall not abate in respect of the land which came to him by descent, or otherwise, from the intestate: yet, if he hath had an advancement from his father in his life-time out of the personal estate, he shall abate for it in the same manner as the other children; see Com. Dig. Advowson, H. And co-heiresses shall also, it seems, bring in such advancement, not being land, as they may have respectively received from their father, before they shall be entitled to their distributive shares; see 4 Burn. E. L. 344; 2 P. Wms. 440. But small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to the child, as of a gold watch, or wedding clothes; see 3 P. Wms. 317; or money expended by the father for his maintenance, or given to bind him apprentice, or laid out in his education at school, at the university, or on his travels, shall not be deemed an advancement; see 3 Bac. Abr. 76.

† In the province of York, the heir at law who inherits any land, either in fee or in tail, is divested of all claim to any distribution; see 4 Burn. E. L. 409. And however small in point of value the land may be, in comparison with the personal estate, he is nevertheless excluded; see 4 Burn. E. L. 409; and even although the estate he inherits be only a reversion; see *ibid*. He is also barred, though the land devolved upon him by settlement made on his father's marriage; 4 Burn. E. L. 410; 2 Vern. 375. Nor, in case lands held by a mortgage in fee descend to

1. M'NABB V. INGHAM. M. T. 1815. Ex. 2 Price, 9.

An affidavit in support of a motion for a *distringas*, stated that the deponent had delivered process to a person at the counting-house of defendant, who informed him that he was his clerk, that the deponent had used all means to serve the defendant in person. *Sed per Cur.* We cannot deviate from the settled practice.—Rule refused.

2. HORTON V. PEAKE. E. T. 1815. Ex. 1 Price, 309.

On motion for a *distringas*, it appeared that process had been delivered at the defendant's brother's house, as he could not be elsewhere found, and it was said he usually resided there. But, on production of an affidavit that he did not live there at that time, the Court refused it. *And, consequently, a distringas*

3. NICHOLSON V. BOUNEY'S M. T. 1816. Ex. 3 Price, 263.

The Court said, that service of the process for the purpose of obtaining a *distringas* ought to be by leaving it at the defendant's actual dwelling house, or usual place of abode; and that, if left at his counting house only, it would be insufficient, unless given to a partner, or some accreditable person there.

him before redemption, shall be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the administrator, it seems he shall be entitled to such distributive share; because then he has nothing by inheritance, nor, in fact, has had any preferment; *ibid.* The principles established in regard to advancement in the construction of the statute of distributions apply, in general, to such as is pursuant to the custom of this district; see 1 Ves. 17; but, as here land as well as money, constitutes an advancement, the heir at law, under the custom, is excluded by his inheritance of the land either in fee or in tail; see 2 Vera. 375. Whereas such inheritance is not barred by the statute, but, as well under the custom as under the statute, younger children, in respect to advancement, are on the same footing. It is essential, in order to the custom of York's attaching, that the intestate should be resident at the time of his death, within the province; but, for that purpose, it is immaterial where his estate is situated.

* The word *distringas* is a Latin word, "that you distrain," which, in law, signifies, a writ having final operation, issuing for the purpose of enforcing some act, as an appearance, or for the performance of a duty; see 1 Lec. Dic. 493. Therefore, if defendant makes default to appear, a *distringas* is the first process for compelling his appearance; see 21 Hen. 4. 50; F. N. B. 70; Gilb. Rep. 106, 107; and a *distringas* was issued, on the removal of a cause by the plaintiff, by *accedas ad curiam*; see 2 B. & P. 137.

By 51 Geo. 3. c. 124. in all such cases, where the plaintiff shall proceed by original, or other writ, and summons or attachment thereupon in any action, or against any person not having privilege of parliament, no writ of *distringas* shall issue for default of appearance, but the defendant shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant of the intent and meaning of such service. And, in case it shall be made appear to that Court, or, in the vacation, to a judge of the Court, from which such process shall issue, or into which the same shall be returnable, that the defendant could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant, that then the plaintiff, by leave of the Court, or order of such judge, may sue out a writ of *distringas*, to compel the appearance of such defendant; and that, at the time of the execution of such writ of *distringas*, there shall be served on the defendant by the officer executing such writ, if he can be met with, and, if he cannot then be met with, there shall be left at his dwelling-house, or other place where such *distringas* shall be executed, a written notice, specifying the court in which the suit shall be depending, &c. And if such defendant shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within eight days after the return thereof, the plaintiff, upon affidavit being made and filed in the proper court of the personal service of such summons or attachment and notice written on the foot thereof, as aforesaid, or of the due execution of such *distringas*, and of the service of such notice as is by the said act directed, on the execution of such *distringas*, as the case may be, may enter a common appearance for the defendant, and proceed thereon as if such defendant had entered his appearance; and that such affidavit or affidavits may be made before any judge or commissioner of the court out of or into which such writ shall issue, or be returnable, authorised to take affidavits in such court, or else before the proper officer for entering common appearances in such courts, or his lawful deputy, and which affidavit is to be filed gratis. By s. 3. the provisions contained in stat. 19 G. 3. c. 70. respecting actions in inferior courts, where the cause of action should amount to less than 10l. shall, from the first of November, extend to all actions in such courts where the cause of action shall amount to 15l. exclusive of all such costs, charges, and expenses aforesaid (except where the cause of such action shall arise or be maintainable upon, or by virtue of any bill of exchange or promissory note, in which case the parties liable thereupon may be held to spe-

It has been said, to found a *distringas*,* the process ought to have been personally served. [453] And, consequently, a *distringas*

At any rate it ought, it seems, to be at his actual or usual place of abode:

[454]

However, service of the *venire* on defendant's servant at his dwelling-house, during his absence abroad, was deemed insufficient.

4. CAULIN v. LAWLEY. M. T. 1815. Ex. 2 Price, 12.

A *venire* was served on a servant of the defendant's, who told the person serving it that the defendant had been gone abroad six months, and was not expected to return for two years. On motion for a *distringas*, the defendant not appearing; the Court said, this service is insufficient for the purpose of founding a *distringas*, unless it can be shown that the defendant had gone abroad for the purpose of avoiding the seizure.

5. STAINS SHERIFF OF MIDDLESEX v. JOHANNOT. H. T. 1778. C. P. 1 B. & P. 200.

So, the service of a summons, and execution of a *distringas* at the defendant's house, who had gone abroad, leaving another in possession of it, was holden regular.

Defendant before the action commenced quitted the kingdom, leaving another in possession of his house and goods. Plaintiff having served a summons to appear at the house, distrained the goods, to compel an appearance. The Court were of opinion that the proceeding was regular.

6. MACMURDO v. BURCH. H. T. 1818. Ex. 5 Price, 522.

And where A., B., and C., were in partnership and A. and B. were arrested. It

On motion for a restoration of goods under a *distringas*, it appeared that B. L. and M. were in partnership; B. and L. were arrested; M. being at that time on a voyage at sea, writs of *venire facias* and *distringas* thereon were issued against M., and executed on the joint goods of the defendants; that they had paid the common issues, but the sheriff was in possession of the partnership's property under the subsequent *distringasses* for increased issues; it also appeared that M. was absent on his business, and not for the purpose of avoiding legal proceedings. It was contended that this was not a case wherein a *distringas* was authorised, in consequence of the absence of the defendant, M. To which it was replied, and resolved by the Court, that, as this was a case of partnership, where two of the partners had been duly proceeded against, and had appeared, the proceeding against the absent partner had been strictly regular.

was holden that service of process at the counting-house of the firm was sufficient to found a *distringas* against B., though it appeared he was abroad on business, and not to avoid process.

So, where the partner in this country refuses to appear for those abroad, the Court will not relieve against a *distringas* to compel appearance though the partnership goods taken were paid for with his own funds.

7. MORLY v. STRANBORN. M. T. 1802. C. P. 3 B. & P. 254.

Three partners, two of whom resided abroad, and one in England, were sued, or a judgment for a partnership debt. The partner resident in England appeared to the action, but refused to appear for the partners resident abroad. The sheriff, under a *distringas* against the two partners, took certain partnership effects. It appeared that these very goods had been seized in the original action, in consequence of a *distringas* issued against the two partners, who did not live in this country, but had been paid for by the partner resident in England, to whom it was also shown the partnership were largely indebted. The Court refused to relieve the partner resident here against such distress.

[455]

8. SCOTT v. GOULD. M. T. 1811. C. P. 4 Taunt. 156. S. P. WATMORE v. BRUCE. M. T. 1817. C. P. 8 Taunt. 57.

Where the process can not be served, as affidavit must be made that it is believed the defendant keeps out of the way to avoid service; process;

This was a motion for a *distringas*, founded on an affidavit, that inquiry had been made by the officer at defendant's house, and that the answer was he was not at home. *Per Cur.* It must be sworn that the officer had not been able to serve the defendant with the process, and that he believed defendant kept out of the way to avoid being served.—Rule refused.

9. TURNER v. WALL, and DOWN v. CREW. E. T. 1814. C. P. 5 Taunt 520; S. C. 1 Marsh, 267. S. P. HARMANN v. DIETRICHEN. M. T. 1814. ibid. 853.

An affidavit, on which a motion was now made for a *distringas*, stated the special bail, in such manner as if the act had not been made; and that so much of any act before the present act passed, for the recovery of debts within certain districts and jurisdictions, which might have authorised the arrest and imprisonment of defendants where the cause of action amounts to less than 15*l.* exclusive of such costs, charges, or expenses, as aforesaid, was by the said act, from and after the 1st of November, repealed. By s. 4. the act not to extend to Scotland or Ireland.

Before the 51 Geo. 3. where the defendant was gone abroad, the service of the sheriff's summons granted on a writ of *venire facias ad respond.* at his place of abode, was held sufficient to found a *distringas*; see *West v. Dalton*, *Forrest*, 29.

deponents belief that the defendant purposely absented himself to avoid process, but did not state the facts on which such belief was founded. The Court refused the rule, as they said that the intent of the proceeding was, that the affidavit might lay before the Court such facts as would enable themselves to judge whether there was sufficient reason for the inference that the defendant kept out of the way to avoid process.

10. JORDAN V. PELLO. M. T. 1814. C. P. 5 Taunt. 702. Semb. n. 1 Marsh. 292.

A motion was made for a *distringas* against a person who was abroad. No statement was made in the affidavit, that the object of the defendant's being abroad was to avoid process. The Court deeming such allegation essential, refused the rule.

broad, must state that he absents himself to avoid process;

11. HARMAN V. DIETRICHSEN. M. T. 1814. C. P. 5 Taunt. 853.

This was a motion for a *distringas*. The affidavit did not set out the tenor of the English notice subscribed to the process. The Court were clear that the affidavit was defective on that ground, as it was the only way they could judge whether the statute had been complied with, and on that account refused the rule.

12. GURNEY V. HARDENBERG. H. T. 1809. C. P. 1 Taunt. 487.

The plaintiff, who, it appeared, did not know at the time of giving credit, that the defendant was out of the realm, proceeded, notwithstanding his absence, to compel an appearance by *distringas*. The defendant, it was shown, carried on business in England. A rule had been obtained to set aside the writ which had been issued, and the proceedings thereon, and to restore the issues which had been levied under a *distringas*; cause was shown, but the Court said, we must discharge the rule; what is the creditor to do if he cannot use this process? The defendant carries on trade in this country, although he is absent, and the persons who supply the materials for his trade, and by means of which he makes his profit, cannot without this method obtain payment for a single article. It is the defendant's own laches that he has not an attorney empowered to act for him in this country; upon the decease of the former, he ought instantly to have appointed another. Many traders who do not reside in England have houses of trade here, conducted by agents, who cannot be sued; there is, therefore, no other method than this of compelling them to pay their debts.

13. ANON. H. T. 1818. C. P. 8 Taunt. 171.

In this case, the Court refused a *distringas* on affidavit, stating that it was believed that the defendant kept out of the way to avoid process; that the officer having applied thrice at the defendant's house, was told each time by the servants that their master was not at home, that they did not know where he was, that he had been absent for months, and that he had not been at home since the officer called last.

14. GREAVES V. STOKES. H. T. 1809. C. P. 1 Taunt. 485.

The plaintiff sued a defendant, who is out of the country, for a debt contracted here by his wife, in his absence, and proceed by *distringas*. A rule had been obtained to set aside the writ of trespass *quare clausum fregit*, and the subsequent proceedings thereupon, and to restore the issues which had been levied under a *distringas* issued while the defendant was abroad and out of the jurisdiction of the court, and that the plaintiff might pay the costs of the application. The Court made the rule absolute, observing: the credit having been given to the wife after the husband's departure renders this a case of peculiar hardship, but it must not be understood that the Court lays down a general rule, that a man leaving at his departure debts in this country and effects also, the creditor may not in some cases distrain; but that is not the case here. And although the wife might perhaps appear for her husband in this case, the action might in another case be brought to recover a debt which she was unacquainted with.

15. NICHOLSON V. BOWNASS. M. T. 1816. Ex. 3 Price, 263.

Motion for a *distringas* against the defendant, for not appearing to a writ of

And facts stated from which the Court may see that the belief is well founded.

An affidavit for a *distringas* against a defendant a

And set out the tenor of the English notice in *hac verba*:

A *distringas* against a defendant abroad for a demand contracted by him during his absence, is regular.

[456]

But the Court refused a *distringas*, where the party appeared to have been absent before the process issued.

And a *distringas* against the husband of a woman will be set aside where the debt was contracted by his wife, and the action was commenced after his departure.

Under 51
G. 3. c.
124. a
plaintiff
shall not be
permitted
to use the
proceeding
of a *distringas*
as a pre-
liminary
step to en-
tering an
[457]

The statute
51 Geo. 3.
c. 124. s.
2. does not
apply to
counties
palatine.

venire facias ad respondendum, on an affidavit of service by delivering a copy of the writ at the defendant's last place of abode previous to his going abroad. The Court said, that on considering the 51 Geo. 1. c. 124., they were of opinion that the statute had not made any other alteration in the old practice, than that a plaintiff should not be permitted to use the proceeding of *distringas* as a preliminary step to entering an appearance for a defendant abroad, and then carrying on the suit as if he had duly appeared. With that object, therefore, they could not grant the process; but, if it were to be used only for the purpose of compelling an appearance for distraining on him till he should appear, they saw no reason why the *distringas* should not issue in the usual course. appearance for a defendant abroad, and then carry on the suit, as if he had duly appeared.

16. MOORE v. TAYLOR. T. T. 1813. C. P. 5 Taunt. 69.

The Court in this case held, that the statute 51 Geo. 3. c. 124. s. 2., which directs that no writ of *distringas* shall issue until affidavit is made of the personal service of a summons, and notice of the intention of the process, or permission given by the Court to issue that process without the personal service, in case that cannot be had, this plea ought to have shown that the summons was personally served, or a rule of Court obtained, before the defendants had executed the process, did not extend to counties palatine.

II. AGAINST WHOM IT LIES.

(A) JURORS. See *post*, tit. Jury.

(B) PEERS AND MEMBERS OF PARLIAMENT. See tit. Parliament.

(C) SHERIFFS. See tit. Sheriff.

III. OF THE AMOUNT TO BE LEVIED THEREON, AND THE RETURN AND SALE OF THE ISSUES.

1. CAGALET v. DUBOIS. T. T. 1797. C. P. 1 B. & P. 81.

Where a
defendant
resists sev-
eral *distringases*,
the terms
on which
the issues
will be re-
turned are
in the dis-
cretion of
the Court.
Hence, in
debt on
bond for

A rule nisi had been obtained by defendant to restrain the issues levied under several *distringases* on his appearance, according to 10 Geo. 3. c. 50. s. 4. It was insisted that the defendant should be put under certain terms; and although opposed, the Court made the rule absolute on payment of costs, the defendant undertaking to plead *instantur*, and take short notice of trial, deciding that it followed as a consequence of the power vested in them, as to returning the issues *at all*, that they had a right to impose terms.

2. LAMBE v. THE EARL OF BLESSINGTON. E. T. 1818. Ex. 5 Price. 639.

In debt on bond for 690*l.* and interest, after there had been a *distringas* issued, under which 40*s.* common issues, had been levied, motion was made for an *alias distringas*, with increase of issues. The Court ordered 100*l.* to be levied on this *distringas*; and on a third, they increased the levy to 300*l.* 690*l.*, and interest after the common issues 40*s.* levied, they were increased to 100*l.* and 300*l.*

3. REG. GEN. T. T. 1798. C. P. 1 B. & P. 312.

If a *distringas* be
returnable
on the last
[458]
day of
term, the
plaintiff
may, at the
rising of the
Court,
move to in-

Upon all writs of *distringas* returnable on the last day of term, the plaintiff shall be at liberty, at the rising of the Court, to move to increase issues on the *alias* or *pluries distringas*, to be issued thereupon on the following day, in case no appearance shall have then been entered. And also that, in like cases, where a *distringas* shall be returnable on the last day of term, and issues thereupon levied, the plaintiff shall be at liberty, at the rising of the Court, to move for leave to sell such issues, to pay the costs of such *distringas* or *distringases*.

crease on the *alias* or *pluries distringas*. And where issues have been levied, he may move for leave to sell them.

IV. OF THE COSTS ON THE DISTRINGAS.

MARTEN v. TOWNSEND. E. T. 1771. K. B. 5 Burr. 2725. S. P. BOUND v.

VAUGHAN. E. T. 1817. K. B. 2 Chit. Rep. 36.

The costs
of issuing
writs of

The plaintiff, in the present action, had proceeded agreeably to the 10 Geo. 3. and had obtained rules for selling the issues levied upon a *distringas*, an *alias distringas*, and a *pluries distringas*; and also a rule for an attachment

against the sheriffs; but no issues had been actually levied. However, the defendant did at length appear: It was thereupon moved, that these rules should be all discharged; but the plaintiff insisted upon the costs; and of that opinion were the Court, who discharged them on payment of costs to the plaintiff.

distringas under 10 Geo. 3.* are to be paid by defendant, though no issues be levied.

V. OF THE TESTATUM DISTRINGAS.

BLOXAM V. LUTTERS. T. T. 1803. K. B. 4 Eust. 161.

The defendant had privilege of parliament; he had been summoned, and a *distringas* had been issued against him in London, where this action was brought, but in which he did not reside, and of which process he had no notice. There had been returns of *non est inventus* and *nulla bona*, in London. A *testatum distringas* had been, therefore, issued into the county of Northumberland, in which county he resided, and had property; but there had been no new summonses. A motion was now made to set aside these several writs for irregularity, and to compel the return of such monies as had been under them levied by the sheriff. It appeared that property to the amount of 12,000*l.* had been levied in the first instance, without any rule to increase issues.

In suits against privilege a *testatum distringas* is issued into a different county to that in which the action is brought, and into which the original summons and *dis*

Per Cur. We are of opinion, that the *testatum distringas* was not irregularly issued; but it is so much of course that the *distringas* should at first only issue for 40*s.*, that no more ought to be levied by the sheriff in the first instance. Upon payment, therefore, of the sum of 40*s.*, the goods, &c., levied by virtue of the said writs, must be restored.

[459] *tringas* have issued, is regular, without any new summons in such county.

VI. AMENDMENT OF.† See ante, vol. i. p. 556.

Disturbance. See tits. *Common; Decoy; Riot; Way.*

Disbend. See tit. *Bankrupt.*

Divorce. See tits. *Baron and Feme; Marriage.*

I. DEFINITION OF, p. 459.

II. DIFFERENT KINDS OF.

(A) A VINCULO.

(a) *Grounds for.*

1st. Impotency, p. 459. 2d. Impuberty, p. 460. 3d. Incest, p. 460.

(B) A MENSA ET THORO.

(a) *Grounds for.*

1st. Adultery, p. 460. 2d. Cruelty, p. 460. 3d Sodomy, p. 461.

III. ALLIMONY, p. 461.

IV. COSTS ON, p. 461.

I. DEFINITION OF.†

II. DIFFERENT KINDS OF.§

(A) A VINCULO.

(2) *Grounds for.*||

* C. 50. which enacts, "that the Court, out of which the writ proceeds, may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff, as the said Court shall think just, under all the circumstances, to order; and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered." With a proviso, sec. 4. that, "when the purpose of the writ is answered, then the said issues shall be returned; or, if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon." This statute extends to all writs of *distringas*, as well those against members of parliament, as others; see 5 Burr. 2726.

† Mistakes in the *distringas* are aided by the statute of jeofails; see Cro. Jac. 896.

‡ A divorce is the judgment of the Spiritual Court, separating two persons *de facto* married; see Co. Litt. 335.

§ There are two kinds of divorces; the one that dissolves the marriage *a vinculo matrimonii*; the other, *a mensa et thoro*; see 3 Inst. 88.

|| As the grounds on which a divorce may be obtained must generally arise from the marriage being litigated; in order to avoid unnecessary repetition on the subject, it will be better to consider the causes under the title of "Marriage."

[460]

1st, *Impotency** 2d, *Impuberty*.† 3d, *Incest*.‡

(B) A MENSA ET THORO.

(a) *Grounds for.*

[461]

1st, *Adultery*.§ 2d, *Cruelty*.|| 3d, *Sodomy*.**

III. ALLIMONY.††

* It has been said, there may be a divorce for perpetual impotence *quoad hanc*, whether natural or accidental; see 2 Leon. 169. 172. 173. But a supervening defect will not vacate the marriage, for there was no fraud in the original contract; see 2 Hagg. Rep. 331. And by the canon law, such a suit ought to be brought within the period of three years; see 2 Phill. Rep. 10; Hagg. Rep. 332; consequently a party contracting a marriage, knowing his own impotency, cannot after long cohabitation, annul his own contract; see 3 Phill. Rep. 147. So, the charge of incurable malformation in the woman was repelled by showing her to be beyond the age of 50, and a delay of sixteen months in instituting the suit, and proof that she had cohabited with a former husband for eighteen years, though she had had no children by him; see 2 Hagg. Rep. 321.

† A divorce *a vinculo* may be obtained in case of impuberty, or the male or female's marrying under the marriageable years, the first under fourteen, or the second under twelve; see Burn. E. L. 500. a.

‡ Incestuous marriages may be annulled, not only at the suit of either of the parties, but at the instance of third persons, whose interests are prejudiced, or likely to be prejudiced by such a connection; see 1 Phill. Rep. 355. But to entitle third persons to institute such proceedings, there must be proof of the interest upon which the parties ground their right of interference; see Poynter, 120.

§ We have seen adultery is a cause of divorce from bed and board, by the ecclesiastical law, *ante*, vol. i. tit. "Adultery." Such divorce is to be obtained in the ecclesiastical court; but if the party injured wishes to marry again, application must be made to parliament for an act of the legislature to dissolve the marriage entirely, and to grant such permission; this however, cannot be obtained, if the party complaining should appear to have connived at the adultery; see *Chambers v. Caulfield*, 6 East, 244. abridged *ante*, vol. i. p. 292. In general, before an application can be made to parliament, a verdict at law should be obtained against the adulterer; see 5 T. R. 357. In some cases, parliament will dispense with proof of such a verdict, if the adultery be clearly proved, and no collusion seems to exist; see 1 Hagg. 12. This suit for adultery may be instituted by a guardian; see 1 Hagg. 5, or by the committee of a lunatic; see 2 Phill. Rep. 158; 2 Hagg. 169; and is not barred by showing a voluntary separation; see 1 Hagg. 142. n.; or a failure to recover in an action for *crim. con.*; see 2 Hagg. 51; and is not answered by the desertion of the husband, from a conviction of her crime, or by his not providing for her from inability so to do; see 2 Phill. Rep. 125.

To this proceeding it may be pleaded that the marriage was void; see 2 Phill. Rep. 11. But incontinence in the wife while sole, is not pleadable in the first instance by the husband, when plaintiff in the suit; see 1 Add. 1; 1 Hagg. 373. And where the husband pleaded that the charge of adultery against him amounted to a solicitation of chastity only, it was overruled with costs; see 1 Hagg. 451; as to the evidence, see *ante*, vol. i. p. 294 to 299.

|| A divorce *a mensa et thoro* may be obtained for cruelty. But the cruelty which entitles the injured party to a divorce consists in that sort of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe; see Poynter, 209; as proof of blows; see 2 Phill. Rep. 111; or menaces; see 2 Phill. Rep. 95. So deliberate insult, confinement, adulterous connection with a person in the same house, and invested with the government of the family, seem grounds of a divorce; see 2 Phill. Rep. 212; 1 Hagg. 72. But minor acts of cruelty, or a display of turbulent temper, are no grounds for a divorce. see Cro. Eliz. 908.

** Sodomical practices seem a ground for a divorce *a mensa et thoro*. The Consistorial Court at York overruled it; but the delegates thought the ground sufficient, reversed the sentence in the court below, and pronounced for the divorce; see Burn. E. L. 496. n.

†† Allimony is that equal proportion of the husband's estate which, by the decree of an ecclesiastical court, is allotted to the wife for her maintenance during the pendency of a suit between them; or it may be permanent as by reason of a divorce; see Poynter, 246. The Court of Chancery will, in some cases, decree alimony to the wife incidentally on *supplicavit*; see 2 Ves. jun. 195. But Mr. Fonblanque, in his excellent treatise on equity, observes, that this seldom has been done, except upon an agreement of the parties; see 2 Fonb. Eq. 104. n. (n).

The principle on which alimony is allotted is, that the husband has possessed himself of the wife's fortune, and that she has not sufficient means, independent of him, to support her in her rank of life. The allotment is discretionary with the Ecclesiastical Court, and stands on the presumption that the wife has no separate income. It has been refused where she had a separate, independent, and superior, income; see 2 Hagg. 203.

Sentence of allotment is absolute, subject to two exceptions, the one where great improvements and alterations appear in the husband's faculties; the other, where there has

IV. COSTS ON.*

Dock. See tits. *Bristol Dock Act; Bristol and Taunton Navigation; Liverpool Dock Act; London Dock Act; West India Dock Act.* [462]

Dock Warrant. See tit. *Stoppage in Transitu.*

Docket Book. See tits. *Bankrupt; Judgment.*

Docket Roll. See tit. *Roll.*

Docketing Issues. See tit. *Issue.*

Dogs.† See tits. *Animals; Game; Taxes.*

TOWNSEND V. WATHEN. M. T. 1808. K. B. 9 East, 277.

It appeared that the defendant had placed dangerous traps, baited with flesh, in his own ground, so near to a highway and also to the premises of the plaintiff, that dogs belonging to the plaintiff, some of which were passing along the highway, and others kept in his own premises, were attracted by the scent of the flesh, and thereby injured. An action on the case was instituted against the defendant. The plaintiff had a verdict. But, upon the case being subsequently brought before the Court, the tenability of the action was doubted.

Sed per Cur. It appears by the evidence reported, that the traps were placed so near to the plaintiff's court-yard, where his dogs were kept, that they might scent the bait, without committing any trespass on the defendant's wood. been fraudulent concealment in his answers to her allegation of faculties; see 2 Burn. E. L. 507.

It is only in force *pendente lite*, and ends on sentence of separation or reconciliation; see Prec. Chan. 496. Alimony, in the first instance, is usually allotted from the return of the citation; but it is in the discretion of the Court to give it from the date where the return is delayed; see 2 Phill. 209. It has been given from the return of the inhibition only where unnecessary delay has occurred; see 1 Phill. Rep. 210.

The amount of alimony has been allowed to the extent of one-third of the husband's income, where a great part of the fortune was brought by the wife, and there was but one child for him to support; see 2 Phill. Rep. 151. But in 2 Phill. Rep. 44. 200*l.* per annum of the husband's income of 2,600*l.* per annum was added to 200*l.* per annum pin-money, because the husband's income was subject to great depreciation.

It is a general rule, that permanent alimony shall be larger than temporary. And, where the fortune came from the wife, in an offensive case of adultery, the Court gave her a moiety; see 2 Phill. Rep. 40. Permanent alimony is due from the date of the sentence. But in a case of a delay to pray the inhibition, the Court could only decree it from the return of the latter; 1 Phill. Rep. 208.

No alimony will be allowed, in case of adultery, on the wife's part; see 3 Bla. Com. 94.

* The husband always pays costs, whether the suit begins on one side or the other; this is founded on the presumption that the husband has every thing. The time when the wife's proctor prays costs to be taxed against the husband is after libel and issue, and before sentence; see 2 Burr. C. L. 505. a. n. But on motion to that effect, the costs of the wife, having a sufficient independent income, were not allowed to be taxed against the husband during the proceedings; see 2 Hagg. Rep. 403.

† The 7 & 8 Geo. 4. c. 30. sec. 31. repeals the 10 Geo. 3. c. 18, and enacts that, if any person shall steal any dog, or steal any beast or bird, ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender being convicted thereof before a justice of the peace shall, for the first offence, forfeit and pay, over and above the value of the dog, beast, or bird, such sum of money, not exceeding twenty pounds, as to the justices shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labor for such term, not exceeding 12 calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction. By s. 32. it is enacted, "That if any dog, or any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession or on the premises of any person, by virtue of a search warrant, to be granted as hereinafter mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof, and the person in whose possession or on whose premises the same shall be so found (such person knowing that the dog, beast or bird has been stolen, or that the skin is the skin of a stolen dog or beast, or that the plumage is the plumage of a stolen bird) shall, on conviction before a justice of the peace, be liable, for the first offence, to such forfeiture, and for every subsequent offence, to such punishment as persons convicted of stealing any dog, beast, or bird, are herein before made liable to.

Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps, scented with the strongest meats, to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act.

[463]

Domicil.*

BRUCE v. BRUCE. Dom. Prac. 1 B. & P. 229. n.

A temporary residence in a foreign country, for a specific object, will not change a party's domicile.

In this case it appeared that a person, born in Scotland, went out to India in the service of the East India Company, and died there. Upon a question arising as to what was his domicile, the House of Lords held that India was the place of his domicile; for the place where a man is, shall *prima facie* be taken to be the place of his domicile. But they observed that, if such person had gone to India in the King's service, or for any temporary purpose, the domicile of his birth would not have been altered; and that a mere intention to return to his native country at some future period was not sufficient to prevent the change of domicile, if such person died before such change was carried into effect.

Doomsday Book.†

[464]

Donatio Causa Mortis.‡

1. HAWKINS v. BLEWITT. T. T. 1817. K. B. N. P. 2 Esp. 663.

A donatio mortis causa must be free from the donor's control;

To support the claim of a *donatio mortis causa*, it was proved that the intestate, in his last illness, ordered the box in question to be carried to the defendant's house, who was his aunt, and to be delivered to her, but gave no other directions respecting it. On the next day, the key was brought to the intestate, who desired it to be taken back, saying, that he should want an article of dress out of it. Per Lord Kenyon, C. J. In the case of a *donatio mortis*

* Is the place where a man has his home. The residence of a party for forty days constitutes a domicile, as to jurisdiction in Scotland. When there are two houses which appear equally entitled to the appellation of domicile, the person is liable to both jurisdictions; but a person may have no domicile, as a soldier, or travelling merchant, in which case a personal citation renders him subject to the jurisdiction of the judge within whose jurisdiction he is cited; see Bell's Scotch Law Dict.

Where a native of Scotland, having lived the greater part of his life in India, on his return from thence took up his temporary residence in England, but without any settled intention where he should fix his abode, and died during a visit to a relation in Scotland; the Court held, that he had acquired no new domicile, but that his Indian domicile subsisted at his death. There is no difference between an original and an acquired domicile; a domicile can only be lost by an abandonment *animo et facto*, and necessarily remains until a subsequent one is acquired. A domicile in India, therefore, being in legal effect of a domicile in the province of Canterbury, the law of England was to be applied in the distribution of his personal estate; see 5 Mod. 379.

† Is the most ancient public document in the kingdom, consisting of two volumes, kept in the receipt of the Exchequer. They contain a general survey of all the counties in England, excepting the four northern, and were compiled soon after the conquest, for the purpose of ascertaining the ancient demesne lands, which were the socage tenures first in the hands of Edward the Confessor, and afterwards of William the Conqueror. This has been always considered a book of the greatest authority; and, if a question should at any time arise, whether a manor is ancient demesne, the trial is by inspection of Doomsday Book; see Hob. 188; Gilb. Ev. 69. These volumes have of late years, been printed at the expense of Government, in consequence of an address from the House of Lords, and the work is said to be executed with the most scrupulous fidelity and correctness. Another ancient survey, which ascertains the extent of the King's ports, is also deposited in the Exchequer; see Gilb. Ev. 69. These surveys are recognised and treated as authentic documents in the courts of justice, having been made by the authority and order of the Government of the country, on public occasions, and on subjects of public interest; see 1 Phill. Ev. 320. 321.

‡ Is a gift in prospect of death—a death-bed disposition—viz: when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal chattel to keep, in case of his disease; see Jac. Dict. tit. Donatio Causa Mortis. To constitute a valid *donatio causa mortis*, 1st, The subject of the gift must be delivered by the donor; and, 2nd, The gift must be conditional, depending on the event of death, and the property is not vested absolutely till after death; see 2 Swanst. 97.

There may be a *donatio causa mortis* of a bond; and, where given in extremity of sickness, and in contemplation of death, it is to be inferred that it should be held as a gift only in the event of death; see 3 Mad. 184.

causa, possession must be immediately given. That has been done here: a delivery has taken place; but it is also necessary that, by parting with the possession, the deceased should also part with the dominion over it; that he has not done. The bringing back the key by her, and his saying that he should want an article out of it, show that he had not any intention of giving the box and its contents.

2. *IRON V. SMALLPIECE*. E. T. 1817. K. B. 2 B. & A. 551.

The plaintiff in trover claimed two colts under a verbal gift made by defendant's testator. As a *donatio mortis causa* it appeared, the colts continued to remain in possession of the testator until his death. Abbott, C. J., was of opinion that, as the property had never been delivered to the plaintiff, it did not pass, but continued in the testator, and, at his death, vested in the executor, and directed a nonsuit. On motion to set it aside, the Court concurred with Abbott, C. J., and refused the rule. And cannot be constituted by a mere parol gift, without delivery.

3. *BUNN V. MARKHAM*. T. T. 1816. C. P. Holt, 352; S. C. 7 Taunt. 225; S. C. 2 Marsh, 532.

The donor, being in a bad state of health, several months previous to his death being confined to his bed, desired his natural son, A., to take the keys of an iron chest, which were in the drawer of a table, in his bed room, and to fetch some money which was there, in a tin box; being brought to him, he counted it, and desired A. to put it in some paper, seal it up, direct it to B. and C., and put it into the tin box, separated from the other property, this was done in the presence of the deceased, who charged A. to see them delivered to B. and C. after his death. The parcel thus so sealed and addressed, was locked up, together with other papers, in the iron chest, and the keys returned to the donor. The donor did not die at that period, and in the mean time, B. had the keys frequently in her possession; through accidental circumstances, though the donor generally had them till the day of his death, at which period he directed them to be given to his executors. The parcel and property therein continued in the same state until after the testator's death, which happened a year afterwards. The defendants, as executors, having possessed themselves of the property; the plaintiffs, B. and C. brought trover. Which delivery must be actual, and not a symbolical one; consequently, if a donor direct a person to deliver certain things to the donee after his death, and in the mean time to deposit them in a chest, of which the donor keeps the key, the donee is not entitled to the gift.

Per Gibbs, C. J., the jury must find for the plaintiffs, subject to the question of law, whether this be a good *donatio mortis causa*? But I cannot think the donor has given the plaintiffs a legal title to this property. Can we call this a *donatio causa mortis*? To constitute a title of this kind, the donor must not only give, but deliver, and that delivery must be actual, where the subject matter of the gift is capable of transfer, for a symbolical delivery, will not do; 2 Ves. 431. But it is proper my opinion should be reviewed. On a rule to set this verdict aside, the Court concurred with C. J. Gibbs, and observed, it was clear this was not a good *donatio causa mortis*, the donor never having divested himself of the possession for a moment. Rule absolute.

4. *SPRATLEY V. WILSON*. T. T. 1815. C. P. Holt, 10.

The deceased, the day immediately preceding his death, whilst the plaintiff was at his bed side, said to her, "I have left a watch at A. B., fetch it, and I will make you a present of it." The defendant having, as executor, obtained possession of it, the plaintiff brought trover. And Gibbs, C. J., said, he could not determine whether a personal chattel can pass by this mode of gift; but directed the jury to find for the plaintiff. And whether, if the donor say to the donee, "fetch it a way and I will make you a present of it," passes a *donatio causa mortis* is unsettled."

Donative. See tits. *Adwoson*; *Mandamus*; *Quære indedit*.

Doors. See tits. *Arrest*; *Ca. sa.*; *Distress*; *Execution*; *Fieri facias*; *Trespas*.

Dormant Partner. See tit. *Partner*.

Double Insurance. See tit. *Insurance*.

Double Pleas. See tit. *Pleas*.

[466]

* And, if there be contradictory evidence, as to the purpose for which a mortgage-deed and bond were given to the obligor, this Court will direct an issue; see 5 Mad. 351.

hold over
under a fair
claim of
right.

[469]

The 4 Geo.
2. is a rem-
edial law;

And stands
in the place
of, but is
more bene-
ficial than,
ejectment.
The notice
to quit*
may be giv-
en before
or after the
expiration
of the term.

And a per-
son appoint-
ed by the
Court of
Chancery
to receive
rents, &c.
is an agent

[470]

lawfully
authorised
within the
meaning of
the act;
and there-
fore, a no-
tice given
by him is
good.†

One tenant
in common
may sue for
his moiety
of double
value.‡

The land-
lord does

incurred by the tenant holding over after the expiration of his term. It appeared that the defendant had a lease, under which he claimed, which however, in an action of ejectment, turned out to be invalid; and the plaintiff (the landlord having recovered the premises) brought this action.

But the Court said, where there is no contumacy or fraud on the part of the tenant, but a fair holding over under a claim, it would be a hard construction to subject him to a penalty for a fair assertion of his title. The usual course has always been by an action of trespass for the mesne profits, and there seems to be no reason for substituting this action for it; as in trespass for the mesne profits, the landlord may recover the full value of the land.

10. *WILKINSON v. COLLEY*. H. T. 1770. K. B. 5 Burr. 2694; Abridged, *post*. It was resolved, that the 4 Geo. 2. c. 28. is a remedial law, the penalty being given to the party grieved.

11. *CUTTING v. DERBY*. E. T. 1775. C. P. 2 Blac. 1077.

Per Cur. An action on 4 Geo. 2. for double value, stands in the place of an action of ejectment, but is more beneficial and effectual.

12. *CUTTING v. DERBY*. E. T. 1775. C. P. 2 Blac. 1076.

On the 30th of September, 1773, the plaintiff gave a written notice to defendant to quit on the 10th of October, 1774, being the expiration of his term, or to pay double value. On the 10th of October, 1774, at twelve at noon, the plaintiff went on the premises, and demanded possession, which was refused; and again in the afternoon, and the same evening, he turned a score of lambs on the premises, which on the 11th of October, the defendant turned off, and held the premises till the 10th of October, 1775. The jury gave a verdict for double the yearly value. On motion for a new trial, because, by the statute, notice to quit must be given after, and not before, the expiration of the term,

Per Cur. The notice to quit may be previous to the expiration of the term: it prevents surprize, and is most for the benefit of both landlord and tenant.

13. *WILKINSON v. COLLEY*. H. T. 1770. K. B. 5 Burr. 2694.

This was a debt on 4 Geo. 2. c. 28., by a person appointed by the Court of Chancery to receive the rents and profits of an estate. On application to the Court of Chancery, an order was made in the cause, on a suggestion that the defendant had refused to quit the possession, and that plaintiff must sue for double value. It was objected, that this notice was not given by the landlord, nor by any agent of his thereunto lawfully authorised, but by the receiver under the order of Chancery, without mentioning the landlord at all. But the Court held, that the receiver was an agent for the landlord, lawfully authorised for this purpose. *Postea* to plaintiffs.

14. *CUTTING v. DERBY*. E. T. 1742. C. P. 2 Blac. 1075.

It was moved in arrest of judgment, that one tenant in common cannot maintain a personal action without his companion. And for this were cited 1 Inst. 195. b; Litt. sect. 311. 315. 316; 1 Sid. 157. But

Per Cur. Where one entire injury is done to both tenants in common, they shall have one entire remedy; but where the injury is separate, they may have several actions. One tenant in common may bring an ejectment for his moiety, and make himself tenant in common with the lessee of the other. The present action stands in the place of an ejectment, but is more beneficial and effectual. Rule refused.

15. *SOULSBY v. NEVIS*. H. T. 1808. K. B. 9 East. 310.

The defendant, after having held of the plaintiff a farm for fourteen years, received a regular notice to quit on the 12th of May, 1806, and the possession

* In writing, is of itself a sufficient demand, within the words of the statute, "after demand made and notice in writing given;" see 5 Burr. 2694.

† So, where notice to quit is given to the tenant, a feme sole, and she afterwards marries, the landlord may maintain debt for double value against the husband, without serving another notice upon him; *Lake v. Smith*, 1 N. R. 174; abridged *ante*, vol. iv. p. 120.

‡ But the executrix of an executrix cannot sue for double value of lands held over after notice to quit under a demise from the testator, contrary to 4 Geo. 2. c. 28. without taking out administration *de bonis non*, even though the tenant has attorned to her; *Tingrey v. Brown*, 1 B. & P. 310. abridged *post*, tit. "Executor and Administrator."

was then demanded of him; but he refused to deliver it up, and held over to the 7th of February, 1807. Whereupon the plaintiff brought his ejectment against the defendant, and recovered possession; and afterwards brought this action of debt upon the stat. 4 Geo. 2. c. 28, for double the yearly value of the premises, in the interval between the expiration of the notice to quit (which was the day of the demise in the ejectment) and the time of recovering possession under the ejectment. The declaration was in the usual form, alleging the demise to, and holding by, the defendant; the demand of possession, and notice in writing to deliver up the premises at the end of the term, on the 12th of May, 1806; the subsequent refusal of the defendant, and his wilfully holding over for three quarters of a year after the 12th of May; and the annual value of the premises. It was objected, on the part of the defendant, that the plaintiff having before recovered the premises by the ejectment, and thereby treated the defendant as a trespasser, the action of debt upon the statute, in which, as it was said, the defendant was proceeded against as tenant, could not be maintained.

Sed per Cur. There is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered, that in many cases the single value might not be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*: the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong. [471]

16. RYALL V. RICH. T. T. 1808. K. B. 10 East, 48.

The plaintiff declared in the first count for double the yearly value, and in the second, for use and occupation. The plaintiff pleaded, as to the demand in the first count, and as to parcel of the demand in the second count *nil debet*; and as to the residue (being the amount of the single rent) the defendant pleaded a tender, and paid the money into court, which the plaintiff took out of court, but proceeded to trial. It was contended on the part of the defendant, that there should be a nonsuit, because the plea of tender of rent covered the whole period for which the double value was claimed in the first count; and the acceptance of the tender, which adopted the terms and character of it, must be taken to be an admission by the landlord that the defendant held the premises, mentioned in the second count, as tenant to him during the whole period for which the rent was claimed; and that he received the tender, as of rent for the same premises, and consequently it operated as a waiver of the penalty. But the Court held the plaintiff was not estopped from taking the money as part of the larger sum claimed; and that going on with the suit showed that he did not mean to take it in satisfaction of the double value.

And where there was a declaration first, for double value; secondly, for use and occupation, and the plaintiff received certain rent paid into court upon the second count, the Court held he did not thereby waive his title to the double value.

Dover Harbour.

HAMILTON V. STOW. E. T. 1822. K. B. 5 B. & A. 649; S. C. 1 D. & R. 274.

A clause was contained in the 47 Geo. 3. c. 69. (an act imposing a tonnage duty on vessels coming into the harbour of Dover) which enacts that nothing in the act could or should extend, or be construed to extend, to charge any ships or vessels belonging to his Majesty, or that should or might be employed in his service, with any of the rates or duties imposed by the act. In this case a vessel had been hired by the Post-Masters-General to carry the mail and government dispatches to and from Dover to Calais, &c. The vessel was permitted to carry passengers and their luggage, and bullion, upon freight. The appointment of the captain stated the vessel to be employed in his Majesty's service; and he was directed to obey such orders as he should from time to time receive from the agents of government. The question was, whether this vessel was within the exemption. An exemption from certain duties on vessels coming into Dover harbour, employed in his Majesty's service, was holden to extend to a vessel hired

by the post master general to carry mails and govern of his Majesty.—Judgment for the plaintiff.

[472]
ment dis-
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master was
also permit-
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certain oth-
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Dower.

I. RELATIVE TO THE DEFINITION AND ORIGIN OF, p. 473.

II. ————— DIFFERENT KINDS OF, p. 473.

III. ————— GENERAL REQUISITES.

(A) MARRIAGE, p. 474.

(B) SEISIN OF THE HUSBAND, p. 475.

(C) DEATH OF THE HUSBAND, p. 476.

IV. RELATIVE TO THE PARTIES ENTITLED TO, p. 476.

V. ————— SUBJECTS OF, p. 477.

VI. ————— ASSIGNMENT OF.

(A) WHEN ESSENTIAL, p. 480.

(B) BY WHOM, p. 480.

(C) MODE OF.

(a) *By metes and bounds*, p. 480. (b) *Livery of seisin, whether essential*, p. 481.

(c) *In the case of mines*, 481.

(D) OF AN EXCESSIVE OR IMPROPER ASSIGNMENT, p. 482.

(E) EFFECT OF AN ASSIGNMENT, p. 482.

VII. RELATIVE TO THE INTEREST AND POWER WHICH THE TENANT IN DOWER IS POSSESSED OF, p. 483.

VIII. ————— DOCTRINE OF ELECTION AS APPLICABLE TO DOWER, p. 483.

IX. ————— THAT WHICH AMOUNTS TO A BAR OF DOWER, p. 484.

X. ————— THE WRIT OF DOWER.

(A) AGAINST WHOM IT LIES, p. 485.

(B) AS TO THE PROCESS PREVIOUS TO DECLARING, p. 485.

(C) ————— PLEADINGS.

(a) *Declaration*, p. 486. (b) *Pleas and replication*, p. 486.

(D) EVIDENCE, p. 488.

(E) VERDICT AND WRIT OF ENQUIRY, p. 488.

(F) DAMAGES, p. 488.

(G) JUDGMENT, p. 488.

(H) AMENDMENT, p. 489.

XI. RELATIVE TO THE FORFEITURE OF, p. 490.

[473]

I. RELATIVE TO THE DEFINITION AND ORIGIN OF.*

* Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life; see Litt. s. 36; 2 Bla. Com. 129.

Dower is called in Latin by the foreign jurists *doarium*; but by Bracton and our English writers, *dow*, which, among the Romans, signified the marriage portion which the wife brought to her husband; but with us, is applied to signify this kind of estate, to which the civil law, in its original state, and nothing that bore a resemblance; nor indeed, is there any thing, in general, more different than the regulations of landed property, according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of King Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one-half of the lands with a proviso that she remained chaste and unmarried; see Somner. Gavelkind, 51: Co. Lit. 33; Bro. Dower, 70; as is usual also in copyhold dowers, or free bench. Yet some (see Wright. 192.) have ascribed the introduction of dower to the Normans, as a branch of their local tenures, though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens tertia*, and *dotalitium*) by the Emperor Frederick the Second, who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom; since, according to the

II. RELATIVE TO THE DIFFERENT KINDS OF DOWER.*

III. RELATIVE TO THE GENERAL REQUISITES.

[474]

(A. MARRIAGE.)

ILDERTON v. ILDETON. T. T. 1793. C. P. 2 H. Bl. 145.

This was a proceeding in dower; the defendant pleaded that the demandant ^{A woman married in Scotland, not in England, and the validity of the such marriage is triable by a jury of the country, and which ought to be tried by the Court said, the first cause of demurrer having been abandoned, the question is as to the jurisdiction of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sensible one: for the sustenance of the wife, and the nurture and education of the younger children; see Bract. 1. 2. s. 39; Co. Litt. 30; 2 Bla. Com. 129.} was never accoupled to J. H. deceased, in lawful matrimony; to this there was a replication, which stated that the demandant, on the 6th of September, 1774, was accoupled to T. J. deceased, in lawful matrimony, at Edinburgh, in that part of Great Britain called Scotland. On demurrer, assigning for causes, 1st, that the supposed marriage, in the replication mentioned; declaring it to have been celebrated in that part of Great Britain called Scotland, was not a marriage, whereby, or by reason whereof, the demandant could by law claim or entitle herself to have any dower of the tenements above mentioned; 2d, that this is not a matter by law triable by a jury of the country, but which is of ecclesiastical cognizance, and which ought to be tried by the certificate of the bishop. On a rejoinder in demurrer, the Court said, the first cause of demurrer having been abandoned, the question is as to the jurisdiction of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sensible one: for the sustenance of the wife, and the nurture and education of the younger children; see Bract. 1. 2. s. 39; Co. Litt. 30; 2 Bla. Com. 129.

* Formerly there were five kinds of dower in this kingdom. But now the first and second are only in use.

1st. *Dower by the common law*, which is a third part of such lands or tenements whereof the husband was to be seised in fee-simple, or fee-tail, during the coverture; and this the widow is to enjoy during her life.

2nd. *Dower by the custom*, which is that part of the husband's estate to which the widow is entitled, after the death of her husband, by the custom of any manor or place, so long as she lives sole and chaste; and this is more than one-third part; for, in some places, she shall have half the land, as by the custom of Gavelkind; and in divers manors, the widow shall have the whole during her life, which is called her free bench; but as custom may enlarge, so it may abridge dower to a fourth part; Co. Litt. 33.

3rd. *Dower ad ostium ecclesiæ*; at the church door, made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed; and in ancient times, it was taken, that a man could not, by this dower, endow his wife of more than a third part, though of less he might; and as the certainty of the land was openly declared by the husband, the wife, after his death, might enter into the land of which she was endowed, without any other assignment; Co. Litt. 34; Litt. s. 39.

4th. *Dower ex assensu patris*, which is only a species of the dower *ad ostium ecclesiæ*, which likewise was of certain lands named by a son, who was the husband, without the consent of his father then living, and always put in writing as soon as the son was married; and if a woman thus endowed, or *ad ostium ecclesiæ*, after the death of her husband, entered into the land allotted her in dower, and agreed thereto, she was concluded to claim any dower by the common law; see Litt. ss. 40, 41.

And lastly, *Dower de la plus belle*, which was where the wife was endowed with the fairest part of the husband's estate.

† One of the circumstances necessary to dower is marriage, which marriage must be between persons capable of contracting together, and duly celebrated; for it is a maxim of the law, *ubi nullum matrimonium ibi nulla dos*; see 1 Inst. 42. a.; and, although the marriage be had before the parties are of sufficient age to consent, yet, if the wife be past the age of nine years at the time of her husband's death, she shall be endowed, of what age soever her husband be, although he were but four years old. And Lord Coke observes, that although *consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12 years, nor a man before 14; yet this inchoate and imperfect marriage, from which either of the parties may at the age of consent disagree, shall entitle the wife to dower; therefore it is accounted in law, after the death of the husband, *legitimum matrimonium quoad dotem*; see 1 Inst. 33. a.; 1 Cru. Dig. 164. It has been stated, that though a marriage be voidable, yet if it be not avoided in the life-time of the parties, it cannot be annulled after; and if a marriage *de facto* be voidable by divorce, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*, yet, if the husband die before any divorce, then (for that it cannot after be annulled) the wife *de facto* will be endowed; see 1 Inst. 336; 1 Cru. Dig. 164.

ble by a jury; in support of which, it has been argued, that the matter of this replication is exclusively of ecclesiastical cognizance; and a passage from Glanville, book vii. chap. 13 and 14, has been cited in support of the proposition that in intendment of law, a jury is not competent to decide upon this matter; that there was in this case no necessity for excluding the ecclesiastical jurisdiction; that in cases of bastardy, which, it was said, are not distinguishable from this case, a writ always goes to the bishop of the diocese where the lands lie, without regard to the place where the espousals were had, or where the birth was, and that the analogy directs how the writ should be directed where there happens to be no bishop having jurisdiction in the place, where the demandant states himself to have been accoupled in lawful matrimony; and, consequently that in this case the demandant should have prayed a writ to the bishop where the lands lay, and ought not to have concluded to the country; it will be impossible to maintain, that in intendment of law a jury is not competent to try questions of matrimony or bastardy. The true proposition is, that the common law is general and fundamental, that the particular trials by the court Christian are to be considered as privileges, and as such, in their nature particular, that every thing which is not within the privilege, belongs to the common law. If in all cases in which a writ goes to the bishop, the writ is sent to that bishop, who has, or is at least presumed to have, jurisdiction of the subject matter; if it is sent to him as ordinary, and in no other character; and if, where it cannot be sent to the ordinary, even within the kingdom, it cannot be sent to a bishop at all. Upon what principle, or upon what analogy of law, can a marriage, distinctly stated to have been celebrated out of any diocese—out of any actual or presumed jurisdiction of any ordinary—nay, out of the kingdom, be sent to any bishop, to be by him inquired into and certified? If the trial cannot be by certificate, we lay it down as a proposition, fundamental and incontrovertible, that the trial is to be by the country; and for a reason that is unanswerable, that there may not be a failure of justice.—Judgment for demandant.

(B) SEISIN OF THE HUSBAND.†

* It has been said, that the fact of marriage cannot be tried by a jury, but only by the bishop's certificate, upon the plea of *ne unques accouple in loyal matrimony* because the direct jurisdiction in questions concerning the legality of marriage belongs to the ecclesiastical courts, and the sentences of those courts on this head are in general conclusive to the temporal courts; see Bract. 302. a.; Dyer, 368. b.

† The next circumstance essential to the existence of dower is, that the husband during coverture be seised in fee-simple, fee-tail-general, or as heir in special-tail, the wife being more than nine years old; see 2 Saund. 45. o. (n. 5.) The wife is entitled to dower, though the husband has only a seisin in law; for, if a seisin, indeed, were essential, it would be in the husband's power, either by his negligence or his malice, to defeat his wife's claim to dower; see 2 Saund. 45. o. (n. 5.) Where the ancestor dies seised, and the heir being married dies without making an actual entry on the lands, his widow shall, notwithstanding he endowed; for, by the descent of the land upon the heir, he acquired a seisin and freehold in law, though not in deed. It would be the same if, soon after the death of the ancestor, a stranger had entered on the land and abated; for, between the death of the ancestor, and the entry of the abator, there was a space of time during which the heir had a seisin in law. If, however, the heir had married after the entry of the abator, and had died without making an entry, his widow would not be entitled to dower, because the seisin in law which he had acquired upon the death of the ancestor, was divested by the abatement before the marriage; so that the heir had neither a seisin in law, nor in deed, during the coverture; see Lit. s. 448; Plowd. 371. Where lands are conveyed to a married man, by a deed deriving its effect from the statute of uses, his wife will be entitled to dower, though the husband does not enter; because, by the operation of that statute, a seisin in deed is transferred. If a man makes a lease for life, reserving rent to him and his heirs, then marries and dies, his wife shall not be endowed of the reversion, because there was no seisin in deed, or in law, of the freehold: nor of the rent, because the husband had but a particular interest therein, and no fee-simple. But if a man makes a lease for years, reserving rent, then marries and dies, his wife shall be endowed, because he continues to be seised of the freehold and inheritance; see 1 Inst. 32. a. It is not necessary that the husband should die seised; for, being seised at any time during coverture suffices; see 2 Saund. 450. (n. 5.) It has been laid down by Lord Coke, that a seisin for an instant is not sufficient to entitle a woman to dower. This position is thus explained,

IV. RELATIVE TO THE PERSONS ENTITLED TO.†

V. RELATIVE TO THE SUBJECTS OF.

1. GILPIN v. COCKSEN. E. T. 1665 K. B. 1 Lev. 182.

On error, it was resolved, that the widow is entitled to dower out of a mill.

2. SROUGHTON v. LEIGH. M. T. 1803 C. P. 1 Taunt. 402.

On the question arising in this case; viz. of what a feme was dowable, the Court, in certifying to the Court of Chancery their opinion on the case made by Mr. J. Blackstone, 2 Com. 131. "The seisin of the husband for a transitory instant, wrought at only where the same act which gives him the estate conveys it also out of him again (as when by a fine land is granted to a man and he immediately renders it back by the same fine) such a seisin will not entitle the wife to dower, for the land was merely *in transitu* and never vested in the husband, the grant and render being one continued act; but, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof."

* Having shown that *marriage* and *seisin of the husband* are essential to dower, we must consider the last requisite—the *death of the husband*, on whose death the wife's estate is consummate; see 1 Inst. 32. b. It seems to have been the old law that, where it could not be made to appear positively that the husband was dead, as where he was absent beyond seas, and no intelligence of him could be obtained, the wife might recover dower conditionally that, if he did return from beyond seas, she should render back her dower to the feelee of the husband without suit, and receive the profits in the mean time; see Hughes Writs, 159; Bract. 302. pl. 2. This question of death, when brought in issue on a writ of dower, is not triable by jury, but by the Court *per testes*; see Moor. 14. It is said, in the old books the wife of a man who is banished by abjuration, or by act of parliament, shall recover her dower in his life time, for this is a civil death; see Jenk. Cent. 1. c. 4; Co. Lit. 183. a.; 3 Bulst. 188; Moore, 851.

† All women who are natural born subjects, and have attained the age of nine years, are entitled to dower, although their husbands be but four years old. And Lord Coke says, if a man marries a woman only seven years old, and afterwards aliens his land, and the wife attains the age of nine, and then her husband dies, she shall be endowed; see 1 Inst. 33. a.

Alien women, generally, are not capable of acquiring dower. By the 8 Hen. 5. all alien women, married to Englishmen by license from the king, are entitled to have dower in the same manner as English women.

The disqualification of alienage may also be removed, either by denization or naturalization; but as to the effect of these two modes there is an important distinction; for, in the former case, if the husband aliens the land before the wife is denized, she will not be entitled to dower; "because," says Lord Coke, "her capacity and possibility to be endowed came by the denization;" see Co. Lit. 38. a.; 13 Co. 23; Jenk. Cent. 1. c. 2.

It seems that a Queen Consort, though an alien, is entitled to dower by the law of the crown; see Co. Lit. 31. b.

The profession of Judaism by the wife is a disqualification to her enjoyment of dower; see Co. Lit. 31. b.; Jenk. Cent. 1. c. 2; 3 H. 6. 55.

By 6 Rich. 2. st. 1. c. 6. it is enacted that, whenever any woman is ravished, that is stolen, and afterwards consents to live with such ravisher, she shall be *ipso facto* disabled from having dower.

The wives of particular persons are also entitled to dower; as the wife of an abator, or disseisor, or discontinnee; see Park. 37; or tenants in common, or coparceners; for, a seisin of the freehold and inheritance, in any particular share, is sufficient to confer a title of dower to the extent of the share of each tenant; see Co. Litt. 371; Litt. s. 45. 1 Roll. Abr. 676; 3 Lev. 84. But the wife of a joint-tenant is not dowable; see Park. 38.

It has been said, the wife of an idiot shall be endowed; see Co. Lit. 30. b. But Sir W. Blackstone, in 2 Com. 130. is of opinion that the law would be otherwise now, on the ground of the decision in Morrison's case, Suppl. to 1 Com. 8. that an idiot, being incapable of consent, cannot contract marriage; see *post*, tit. Marriage. It was, however, doubted, in 1 V. & B. 140. whether it was not essential to have a sentence of the Ecclesiastical Court, declaring such marriage void.

The wife an alien, we have seen, is not entitled to dower, unless married by the King's special license; see 2 Saund. 46. a.; for although he has a capacity to purchase lands, he can only hold them for the benefit of the Crown; see Jenk. Cent. 1. b. 2; Co. Lit. 31. a. So the wife of a feelee to the uses executed under the statute of H. 8. is not dowable; see 2 Saund. 46. n. p.

‡ Of all real hereditaments, whether corporeal or incorporeal, unless there be some special custom to the contrary. Hence, a widow is endowable of an advowson in gross or ap-

[477]

The widow is dowable out of a mill;

[478]

And mines wrought at any time daring co

verture, whether or not the succeeding owner continues to work them. *Secus* of mines not opened;

use of the following observations: We are of opinion, that the widow of A. B. was dowable of all his mine of lead and coal, as well as those which were in his own landed estates,—as the mines and seeds of lead and lead ore—and coal in the lands of other persons, which had in fact been open, and wrought, before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endow'd of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his life-time, or by those claiming under him since his death. We think, too, that her right of dower of such mines, &c. could not be in any respect affected by leases made by the husband during the coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment, (if made of the mines) must be of the reversions, and of the rents reserved by such leases as incident to the reversions; in which case they thought the widow would be bound, so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. We are also of opinion, that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

3. GERARD v. GERARD. II. T. 1691. K. B. 1 Salk. 253; S. C. 1 Ld. Raym. 72. S. C. 5 Mod. 278.

So of the capital messuage or mansion to

On a writ of error on a judgment in C. B. given on a writ of dower, where the tenant as to part, confessed the action, and judgment was given in C. B., and a *misericordia* entered against the tenant; and, as to the rest, the tenant pendant; see 1 Cro. Jac. 624; F. N. B. 148; Co. Lit. 32. a. So, of common in gross or appurtenant; see W. Jones, 315. So, of an equity of redemption in fee; see 2 Saund. 46. n. p. So, of tithes; since the 21 Hen. 8.; see 2 Saund. 46. b. n. p. So, of an use, since the 27 Hen. 8.; see 2 And. 75. And the same rule applies to manors; see Godb. 135; Gouldsb. 37; rent services; see Perk. s. 345; rent-charges, or seeks; see Co. Lit. 32. a.; Perk. 317; franchises of an honour; see Cro. Jac. 672. So, of all liberties and profits savouring of the realty; see F. N. B. 18. wherein the husband is seised of an estate of inheritance, as a fishery; see Co. Lit. 32. a.; offices; Style, Pre. Reg. 122; Thel. Dig. 67; F. N. B. 18; ashalliff or parker; see 12 E. 3. Dow. 9; Co. Lit. 32. a.; F. N. B. 8; marshal-see of the K. B.; see 21 E. 3. 57; Co. Lit. 32. a.; F. N. B. 8. Custody of the gaol of Westminster Abbey; see Co. Lit. 32. a. So, of a fair; see 15 E. 3. Dow. 81; Co. Lit. 32. a.; market; see 12 E. 2. Dow. 157; Gilb. Uses, 371; F. N. B. at dove-house; see Co. Lit. 32. a.; fines, heriots; see Co. Lit. 32. a.; profits of courts, see Co. Lit. 32. a.; shares in the navigation of the river Avon; see 1 Ves. jun. 652. So also the widow is entitled to dower out of all estates in fee-simple whereof her husband is seised, or in tail general or special, if her issue be capable of inheriting them; see Litt. s. 53; 1 Inst. 49. a. And dower is an incident so inseparably annexed to an estate tail, that it cannot be restrained by any proviso or condition whatsoever; and though the estate tail should determine by the death of the husband without issue capable of inheriting it, yet the wife shall be endowed, because dower is a condition tacite annexed to the gift of every estate tail; see Litt. s. 53; 1 Inst. 224. a.; Cro. Eliz. 280. So the wife is dowable of a qualified fee as long as it continues; see 1 Saund. 260. Therefore, in the case of a limitation to A. and his heirs, tenants of the manor of Dale, the widow of A. would be entitled to dower. And the same rule is applicable to a base fee; so that, if a tenant in tail conveys his estate by fine to A. and his heirs, by which he acquires an estate to him and his heirs as long as the tenant in tail has heirs of the body, the wife of A. will be entitled to dower against her husband's heirs; see Powell 557; 1 Saund. 260. So, the widow is entitled to dower out of trust estates; see 2 Saund. 46. n. p.

Having seen what property is chargeable with dower, it becomes essential to consider what is not subject to dower. The widow is not dowable of copyhold estates; see Chapman v. Sharpe, 2 Show. 198; abridged ante, vol. vi. p. 355; unless by custom; see 2 Saund. 46. n. So, estates held with other persons in joint tenancy are not subject to dower, see 1 Cruise, Dig. 173. And an estate in dower, being a continuation of the husband's estate, is, therefore, only incident to estates of inheritance, not to estates which the husband holds for his life. And it is not only necessary that the husband should have an estate of inheritance, to entitle the wife to dower, but the estate must also be *seised* at *seml* in him; see 1 Salk. 254; Ca. Temp. Hard. 13. So, a widow is not dowable of a wrongful estate; see 1 Inst. 31. b.; F. N. B. 149; as, where a man, having title to lands, enters, and disseises the tenant, and dies *seised*, and his heir enters, by which he is remitted to the ancient right, the widow of the disseisor is not entitled to dower, because her husband's estate was wrongful; see 1 Inst. 31. b.; F. N. B. 149. So, a widow is not dowable of lands assigned to another woman in dower; see 1 Inst. 21. a.; 4 Co. Rep. 121. And the widow was never allowed dower of a use; nor is she now entitled to dower where an estate is conveyed to a man by way of mortgage; see 1 Cru. Dig. 174.

pleaded, that the messuage in demand had, time out of mind, been called as baronies, well Gerard's Bromley, as Bromley-hall; that Sir T. G. was seised thereof in his demesne as of fee; and, being so seised, King James I., by letters patent, under the great seal of England, created the said Sir T. G. baron of Gerard's Bromley, and that he resided with his family, in the said capital messuage, and entitled to so the messuage in demand became, and had ever since continued, the plea of *caput baronie*, brings down the descent both of the barony and messuage to himself, and demands judgment, if of the third part thereof the demandant ought to be endowed. The demandant demurred, and judgment was given in C. B. for the demandant. On error, it was insisted that the demandant ought not to be endowed of *caput baronie*; because it is for the honour of the kingdom to have the chief seat kept entire; and for authorities were cited, 1 Inst. 31. b.; F. Abr. Dower, 180; Bract. lib. 2. 170. b. p. 4 H. 3; Rot. 7. The defendant's counsel in error argued, that the authorities cited on the other side were of feudal baronies, of which there were not any remaining at this time, except Arundel; of which opinion were the whole Court, who observed: feudal baronies were when the King, in the creation of the baronies, gave lands and rents to hold of him for the defence of the realm. But the King could not make this a barony which was in the seisin of the Gerard's before.—Judgment affirmed.

4. BATE'S CASE. H. T. 1696. C. P. 1 Salk 254; S. C. Lutw. 723; S. C. 1 Ld. Raym. 326.

Tenant for life; remainder to trustees for ninety-nine years; remainder to tenant in tail. Tenant for life dies; his wife shall be endowed, notwithstanding the intervening estate, for that, being for years only, is not to be regarded. It would have been otherwise if the mean intervening estate had been for life, for that would have obstructed the dower.

5. RAY V. PUNG. E. T. 1822. K. B. 5 B. & A. 561.

In the court of equity it appeared that there had been a conveyance in trust for such uses as J. R., should appoint; and until any such appointment should be made, to the use of the said J. R., his heirs, and assigns, for ever. J. R., being previously married, executed the appointment; and his appointee afterwards agreed to sell the estate to the defendant, who refused to complete the purchase, without the wife of J. R. joining in a fine to bar any claim to dower which she might have, in case she survived her husband. The Court held that, amidst such conflicting authority, it was a question of too much doubt to bind a purchaser without the opinion of a court of law. This Court afterwards, upon a special case held, that the wife of J. R. was not dowerable of the property. The estate of the husband being a qualified fee, defeasible by the appointment, the title to dower was defeated by the determination of the estate on which it depended.

6. DUNCOMB V. DUNCOMB. H. T. 1694. K. B. 3 Lev. 437.

Upon a writ of dower it appeared, by special verdict, that W. D., the husband of the demandant, was tenant for life; the remainder to J. S. and his heirs for the life of W. D.; the remainder to the heirs male of the body of W. D.; with the ultimate remainder in fee to G. D., the tenant to the writ. It was argued for the demandant, that the whole estate was really in W. D.; and the remainder to J. S. for the life of W. D. was no more than a possibility; so that, if W. D. had committed a forfeiture, J. S. might take advantage thereof, for preservation of remainders, but that, in the mean time, the whole estate is executed in W. D. And Bowle's case, 10 Co. 83. was cited, which was that of an interposed contingent remainder to unborn sons. But the Court, upon the first argument, without any hesitation, gave judgment for the tenant. W., remainder to the heirs male of the body of W., the wife of W. shall not be endowed.

7. KENT V. KERRY. E. T. 1724. K. B. 1 Stra. 625.

Error of a judgment in C. P., in dower, *de tertia parte*, of three houses and a tenement. Judgment for the demandant, in C. P. was reversed, because it does not lie a tenement; see 2 Cro. 125. 621.

* It had been stated, that a woman is not entitled to dower out of an estate in remainder or reversion, expectant on an estate of freehold, because the husband has no seisin; but a woman is dowerable of a reversion expectant on a term for a year, because the husband is seised of the freehold; see 1 Cru. Dig. 172. So where a remainder in tail or fee descends

[479]
And the wife of a tenant for life, with remainder for years, and remainder to A. in tail, shall be endowed.

So, if an estate be conveyed to A. B. to such uses as he shall appoint; and, in default of appointment, to his own use, the wife's title to dower attaching, but may be subsequently defeated by the exercise of such power.

But of estate for life to W., remainder to J. S. and his heirs for the life of W., no dower of a tenement.

VI. RELATIVE TO THE ASSIGNMENT OF.

(A) WHEN ESSENTIAL.*

(B) BY WHOM.†

(C) MODE OF.

(a) By metes and bounds.

GILPIN v. COCKSON. E. T. 1665. K. B. 1 Lev. 182.

In dower, a mill cannot be assigned [481] by metes and bounds.‡ Error on a judgment in dower of the third part of a mill. Where judgment was to recover seisin of the third part in severalty by metes and bounds, error assigned was, that the judgment ought to have been of the third part only, and not by metes and bounds, because it it were divided in that manner, neither of the parties could use it. And of that opinion were the Court. — Judgment reversed.

(b) *Livery, whether essential.*

ROWE v. POWER. M. T. 1805. C. P. 2 N. R. 1.

Neither livery of seisin, nor writing, is necessary to assignment of dower. A seised in fee, devised to B., his son, for life: remainder to the heirs of his body in tail. remainder to his own three daughters and their heirs. On the death of A., B. entered and became seised of all, and, by deed between himself and his mother, assigned to her the possession of a third part of all the premises, to hold to her and her assigns for her life, as if she had been in possession of the same by virtue of a writ of dower; and appointed C. and D. attorneys, to enter and give livery and seisin of one full third part; and the indorsement of the deed stated, that C. and D. delivered seisin of all the premises to the mother, to hold according to the uses and intentions of the deed. B.'s mother having become seised of an undivided third part of all the lands, and, during her life, B. levied a fine *sur conscience de droit come ceo*, with proclamations of the whole of the premises, and suffered a recovery, and died, leaving no issue, but having devised away all the lands of A. to a stranger.

The Court held, that the deed between B. and his mother, and livery made thereon, was a good assignment of dower to her; and, therefore, the fine and recovery suffered by B., and non-claim within five years after the death of B. did not bar the remainder in fee to the daughters of A. in that one third part which B.'s mother had in dowry at the time of such fine and recovery; and alluded to Lord Coke, in his Commentaries, p. 34, who expressly says: "But on tenant for life, either by his own act or the operation of the law, the two estates are so consolidated that it should seem the intermediate contingent estates are destroyed; or, if they do open on the contingencies happening, they are suspended till that time, and the wife of the tenant for life, with such contingent remainders, shall have dower; *Hooker v. Hooker*, Ca. Temp. Hard. 13, abridged post, tit. Remainder.

* The widow has no estate in the lands of her husband until assignment; see 2 Bla. Com. 132; Gilb. Ten. 26. Formerly, she could not obtain an assignment of her dower, without paying a fine to the lord; nor could she marry a second husband without his licence. It was even usual for the lords to force widows to marry, merely for the purpose of obtaining a fine. It was, therefore, provided, by the charter of Henry I., and also by Magna Charta, that widows should not be forced to marry, or to be obliged to pay a fine for the assignment of their dower; see 2 Inst. 16.

† No person can regularly assign dower who has not a freehold estate in the land; see 1 Inst. 35. a. It will, accordingly, be found in the books that an assignment of dower by a guardian in socage, a tenant by eligit, statute staple, or statute marchant, or a lessee for years, is not good, see Co. Lit. 35. a; 6 Co. 58; 19 Ass. 62; 1 Rol. Abr. 682. An exception to this doctrine formerly prevailed, in the case of a guardian in chivalry, founded upon reasons which it is no longer of practical importance to inquire into; see Co. Lit. 39. b; 9 Co. 17; 6 Co. 58. But an assignment made by a disseisor, abator, intruder, or other person having the freehold by wrong, may, and in most cases will, be good, and binding upon the persons having right; see Co. Lit. 35. a; 6 Co. 58; 12 Ass. 20.

‡ With respect to the manner in which dower ought to be assigned, the rule is, that, where the property is capable of being severed, it must be by metes and bounds; and, if the sheriff does not return seisin by metes and bounds, it is ill. But, where no division can be made, the widow must be endowed in a special and certain manner, either of the third, or the entirety for a certain time; see 1 Inst. 32. b. The right to have an assignment of dower by metes and bounds may be waived by the widow; and, in that case, an assignment in common will be good; see 2 N. R. 1. But an assignment by the sheriff must be by metes and bounds, if it can be done; see 9 Vin. Abr. 296; however, an assignment by metes and bounds can only take place where the husband is seised in severalty; for, where he is seised in common with others, his widow cannot be endowed by metes and bounds; for she, be-

there needeth neither livery of seisin nor writing to any assignment of dower; because it is due of common right."

(c) *In case of mines.*

STOUGHTON v. LEIGH. M. T. 1808. C. P. 1 Taunt. 410.

The Court certified, as to the assignment of dower in this case, that the sheriff was obliged to estimate the annual value of the estates of which the widow was dowable, and said: it was not absolutely necessary that he should assign to her any of the open mines themselves, or any portions of them. The third part in value which he should assign to her, might consist wholly of land set out by metes and bounds, and containing none of the open mines; or, he might include any of the mines themselves in the assignment to the widow, describing them specifically, if the particular lands in which they lie should not also be assigned; but, if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned; and, as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit. Or, the sheriff might divide the enjoyment and perception of the profits of any of the particular mines, as after-mentioned. In regard to the mines and strata which the husband had in the lands of other persons, they were of opinion that it was not necessary that the sheriff should divide each of the mines or strata; but he might assign such a number of them as might amount to one-third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole. If the division of an open mine could be made by metes and open bounds, as lands are required to be divided, without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but, as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord Coke, 1 Inst. 32. a., wherein it is held that the sheriff may make the assignment in a special manner: and that, therefore, he might so proceed with respect to the mines in question. They found no authority, however, establishing any precise mode of dividing a mine; nor could they point out any that might not be attended with inconvenience, but, if the sheriff was to make the assignment, they thought he might lawfully execute his duty, by directing separate alternate enjoyment of the whole, for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits.

(D) OF AN EXCESSIVE OR IMPROPER* ASSIGNMENT.

STOUGHTON v. LEIGH. M. T. 1803. C. P. 1 Taunt. 402.

An assignment had been made of dower by the heir himself, after he had attained twenty-one years of age. The Court certified, that the heir had no remedy at law against the dowress, for avoiding the consequences of that act. Had he been, said they, under age at the time, he might have had relief by writ of admeasurement of dower: or, had the assignment been made by the sheriff in execution of a judgment in dower, the heir might have had a scire facias to obtain an assignment *de novo*.

(E) EFFECT OF AN ASSIGNMENT.†

VII. RELATIVE TO THE INTEREST AND POWER WHICH THE TENANT IN DOWER IS POSSESSED OF.‡

ing in pro tanto of her husband's estate, must take it in the manner in which he held it; see 1 Inst. 32. b.

* Where the sheriff makes an improper assignment of dower, it will be set aside by the Court of C. P. or Chancery; see 1 Keb. 743; 1 Vern. 218.

† The widow acquires an estate of freehold by her assignment, without livery of seisin, because dower is due of common right; see 1 Inst. 35. a. As soon as dower is assigned, the widow holds by the institution of the law, and is invested of the estate of her husband; so that, after assignment, she is considered as holding by an infeudation immediately from the death of her husband; see Litt. 39.; Gilb. Uses, 356.

‡ Dower is generally an estate for life, unless otherwise stipulated at the time of the marriage. Tenants in dower cannot alien; see 6 Edw. 1. c. 7. or levy a fine; see 11 H. 7. c. 20; 32 Hen. 8. c. 35; and are prohibited from committing waste. The dowress is entitled

Dower may be assigned of mines, either collectively, with other lands, or separately of them selves. It must be assigned by metes and bounds, if practicable (182) otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole for short periods.

If the heir, being of full age, assigns excessive dower, he has no remedy at law.

VIII. RELATIVE TO THE DOCTRINE OF ELECTION AS APPLICABLE TO DOWER.*

[484] IX. RELATIVE TO THAT WHICH AMOUNTS TO A BAR OF DOWER.

1. BENSON v. SCOT. H. T. 1692. K. B. 3 Lev. 386.

Alienation
seems no
bar to dower.
er.†

In this case it was resolved that the husband could not, by alienation, defeat the wife of her claim to dower.

to emblements: see 2 Inst. 80; and holds her dower discharged from all her husband's incumbrances: see 1 Inst. 46; 1 Co. Rep. 65. a. And tenant in dower may work an open mine in the land assigned, though not specifically mentioned in the assignment; see 1 Taunt. 402.

* No collateral satisfaction can, at law, be pleaded in bar of a suit for the recovery of dower. But, in equity, any direct satisfaction, though not consisting of a strict legal jointure, may constitute a sufficient answer to the claim of dower; see Co. Lit. 36. b. If a testator makes a provision for his wife by will, and disposes of his freehold estates, out of which she is dowable in such a manner as to disclose an intention that she should not take the provision and her dower, but should have the former in lieu of the latter, a court of equity will compel the wife to elect between the two interests, and not to enjoy both; and a wife is put to her election on the same principle as a stranger: see 4 Mad. 125. The difficulty appears to have consisted in ascertaining the intention of the testator; see Amb. 732. The true way of ascertaining it, is to look into the will, and see whether it is plain, clear, and manifest, that he could not possibly give what he had given consistently with his wife's claim to dower: see 2 Ves. jun. 577. And inequality in point of value between dower and the subject of collateral satisfaction will not preclude a case of election; therefore, though the benefits be much inferior in point of value of dower, yet that circumstance will not of itself preclude the existence of a case of election. Although a court of equity will not permit a widow, taking beneficial interests under her husband's will, to leave her dower also out of his estates; yet, if her taking dower would not operate to overturn the will in toto, and the gift to her is not said to be in recompense or satisfaction of dower, she may enjoy as well the interests communicated by the will as her dower. The intention that a wife shall not claim both her dower and also a benefit under her husband's will, arises from necessary implication, or express declaration. If, therefore, no such intention results from the will, or if no such declaration appears, she will be entitled as well to such benefit as to her dower. As, where a husband gave a bond in the penalty of 1,000l. for securing 500l. to his wife in case she survived, the same was held to be no bar of her dower; and though parol evidence was tendered of her acknowledgment that it should be so, yet the same was not permitted to be read, being within the statute of frauds; see 3 Atk. 8. So, where a testator devised an annuity of 500l. to his wife for life, payable out of his freehold and copyhold estates, with a clause of entry and distress, and, subject thereto, devised the same to his three children, Lord Hardwicke held the wife to be entitled both to her dower and annuity; see 1 Bro. C. C. 292. n. And the bequest of the residue of personally to the wife will not create a case of election between that interest and dower; 1 Ves. sen 230. It seems, that the intention of the widow, as capable of being collected from certain acts done; or things acquired in by her, must constitute the intention upon questions whether an election between conflicting interests has, or has not been made. Mere length of time cannot of itself form the governing principle, since we find that election may be kept open for fifty years, or rather, that it may last until the whole of the testator's affairs are wound up, and the trusts of his will executed; see 3 Bro. C. C. 90, 1 Ves. jun. 172. But possession taken by a widow of benefits offered to her by her husband's will in lieu of dower affords the most obvious evidence demonstrative of an election; see Bro. C. C. 88; 1 Ves. jun. 171. However, the widow is not concluded by election made in ignorance; 12 Ves. 136; because the widow is entitled to know her rights previously to electing. See 1 Ves. jun. 172; 1 Russ. 149; and Mr. Stulman's able and elaborate Treatise on the Law and Doctrine of Election, where the author has reduced to a system a class of cases that had hitherto been thought to consist merely of a few detached and insulated points.

† A widow may be barred of her dower by her husband's attainder of high or petit-treason; see 5 and 6 Edw. 6. c. 11; but not in cases of misprision of treason or felony; see 1 Edw. 6. c. 12. So, divorce a vinculo matrimonii is a bar, but not a mensa et thoro; see 2 Saund. 46. So, alienage or detaining the title of deeds of the estate from the heir, is a bar; see Co. Lit. 39. So a woman may be barred of her dower by levying a fine or suffering a recovery during her coverture; see 2 Saund. 42 n.; or, by the custom of London, she may bar herself of dower by deed of bargain and sale, acknowledged before the Lord Mayor, or the Recorder and one Alderman; see Cro. Dig. 187; but a bequest of the residue of personal estate will not be deemed a bar of dower; see 1 Cru. Dig. 196; and, as to what devise shall be considered as a bar or satisfaction; see ante, tit. Devise.

The most usual way of barring dowers is by jointures, regulated by the 27th of Hen. 8. c. 10. A jointure which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only is thus defined by Sir Edward Coke; see 1 Inst. 36: "A competent livelihood of freehold for the wife of lands and tenements, to take effect in profit or possession, presently after the

2. COOT. v. BERTY. M. T. 1697. K. B. 12 Mod. 232.

[485]

In dower the defendant pleaded elopement in the wife. The wife replied that her husband had bargained and sold her to the adulterer. The Court held it bad, because licence by husband to wife to lie with another man could not be pleaded to trespass, going only in mitigation of damages.

But elopement is;

3. BURDON v. BURDON. E. T. 1691. K. B. 1 Salk 252.

On a writ of error on a judgment in the court of Durham, on a writ of dower, the defendant, after imparlance, had pleaded detainer of charters; and, on demurrer, judgment was given by the Court for the demandant, which was now affirmed. *Per Cur.* He that pleads this plea must plead, that from the time of the death of his ancestors he was provided for, and that such provision is still remaining to assign her dower, if she would deliver her charters.

And he who pleads detainer of charters in bar of dower, ought to plead that he has been always ready, and still is, to deliver his charters, &c.

X. RELATIVE TO THE WRIT OF DOWER.*

(A) AGAINST WHOM IT LIES.†

(B) AS TO THE PROCESS PREVIOUS TO DECLARING.

FURNIS v. WATERHOUSE. H. T. 1673. C. P. 1 Mod. 197.

A *supersedeas* was moved for to stay proceedings upon a *grand cape* in dower, *quid erone en marit*; because the return of the summons was not after summons, according to the statute of 31 Eliz. c. 3. the words of which statute are, "that after every summons upon the land, in any real action, 14 days' notice, at the least, before the day of the return thereof, proclamations of the summons shall be made on a Sunday, &c., at or near the most usual door of the churches or chapels of that town or parish where the land whereupon the death of the husband, for the life of the wife at least." This description is framed from the purview of 27 Hen. 3. c. 10. commonly called the statute of Use; at present, it is to be observed, that before the making of that statute the greatest part of the land of England was conveyed to uses, the property or possession of the soil being veiled in one man, and the use or profits thereof to another, whose directions with regard to the disposition thereof the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein, he not being seised thereof; wherefore it became usual on marriage, to settle by express deed some special estate to the use of the husband and his wife for their lives, in joint tenancy or jointure, which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained that such as had the use of lands should to all intents and purposes, be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure; had not the same statute provided that, upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower; 4 Rep. 1. 2. But then these four requisites must be punctually observed: 1st, The jointure must take effect immediately on the death of the husband: 2d, It must be for her own life at least, and not *per autre vie*, or for any term of years, or other smaller estate; 3d, It must be made to herself, and no other in trust for her; 4th, It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her after marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture; and if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law; see 2 Bla. Com. 138.

* A writ of dower is in the nature of a writ of right, and lies where the heir or terre-tenant refuses to assign dower to the widow. The writ of dower *unde nil habet* lies where no dower has been assigned; but if any part of the dower has been assigned, the widow cannot say *unde nil habet*, and she must have recourse to the writ of dower generally, which is a more extensive remedy; see Gilb. Uses, 374.

† A writ of dower lies against no one but the tenant of the freehold; see 2 Saund. 43; therefore it cannot be brought against the guardian in socage; see 29 Ass. 68; Bro. Dow. Pl. 63; or any person who has but a chattel interest, as a tenant by *elegit*, tenant for years, &c.; see 9 Co. 17; and it seems that, although judgment and execution should be had against such a tenant, yet he may afterwards enter upon the demandant; see 1 Leon. 92. So the reversioner may be received to save his title, where the suit is brought against the tenant for life; see Godsb. 126.

proclamation of summons was made.

summons was made doth lie; and that proclamations so made shall be returned, together with the names of the summoners." Secondly, the land lieth in a vill called Heriock, and the return is of a proclamation of summons at the parish church of Halifax; and it does not appear that the land lies within that parish. The Court held the objection tenable.

[486]

The declaration should demand a third part of the whole premises;

And not use the word tenement.

In dower, the tenant may plead that the husband of the defendant made a lease, still existing, of the estate,

[487]

before any title to dower accrued, and conveyed the reversion, But the tenant in dower cannot plead *ne unques seisie*, and also *ne unques accouple*. And the plea of lessee for years ought not to be received

1. *WHELPDALE V. WHELPDALE*. T. T. 1683. C. P. 3 Lev. 169.

It was resolved, that a count in dower must demand a third part of the whole premises, and not a certain quantity, though, in truth, a third part of the whole.

2. *KENT V. KERRY*. E. T. 1725. K. B. 8 Mod. 355.

In dower the plaintiff declared for her dower in three messuages and three tenements. The Court held the word tenement too uncertain, and therefore that the declaration could not be sustained.

(C) PLEADINGS.

(a) Declaration.

1. *ANON. H. T.* 1273. C. P. 2 Mod. 18; S. C. 2 Saund. 44.

In dower the tenant pleaded, that a lease was made by the husband for 99 years, before any title of dower accrued, which lease was yet in being, and showed that the lessor afterwards granted the reversion to J. S., and died; and that J. S. devised to the tenant for life. The defendant replied, that the lessor made a feoffment in fee. The tenant demurred.

Per Cur. The substance of the plea is good, because there was a privity in the grantee, and it was for his benefit to avoid the demandant's seisin.

2. *ANDERSON V. ANDERSON*. T. T. 1743. C. P. 2 Blac. 1157.

In dower, it was moved for leave to plead, 1st, *Ne unques seisie que dower*. 2d, *Ne unques accouple*, &c. and 2 Wils. 118. was cited, where the same thing had been done. But it not appearing that this matter was then under consideration of the Court, Gould and Blackstone, Js., thought leave should not be granted; because, 1st, The two pleas must be tried in two several jurisdictions, by jury, and by the certificate of the ordinary. 2dly, It tended to delay the widow, whose subsistence may depend on the event of the suit. Dower is *festinum remedium*, and therefore no essoin is allowed therein. 3dly, Gould, J., thought the pleas inconsistent.—Rule refused.

3. *GREEN V. ROE*. T. T. 1737. C. P. 2 Can. 581.

In dower, the defendant pleaded that A. B. was seised in fee, and made a lease to C. D., but did not show when seised in fee, or that the term was assigned to him; so it might be after coverture. After judgment for the demandant, C. D. claiming by lease for years from A. B., father of the demandant,

* The process is by summons to appear; and if the tenant neglects, or does not cast an essoin (*semble*, no essoin is allowed, 2 Blac. 1157.) then by grand cape and petit cape in the C. P.; see F. N. B. 148; Febr. Dow. 48; 2 Saund. 48. n. No notice of summons by the demandant is necessary; see 2 Saund. Rep. 43. If the lands lie in several parishes, a proclamation at the church door of one is sufficient; see Hob. 133. The summons is returnable on the day of the return of the writ; see 2 Saund. 48. On the return of the summons, the tenant's attorney may enter appearance with the filacer, and pray view. &c. Then passes, in some cases, a writ of view, whereby the sheriff is to show the tenant's land; and, on return, the tenant's attorney takes a declaration, and generally pleads *ne unque seisie*, &c.; see Bull. N. P. 119; 2 Saund. 44. n.; Com. Dig. Pleader. 273. If tenant appears not at the return, demandant is entitled to judgment of seisin and writ of inquiry of damages; if he does not appear at the return, demandant may waive the default, and take an appearance; see 6 Mod. 4; 1 Salk. 216; 2 Saund. Rep. 43.

The jury process in this action is the same as in personal actions in the C. P. viz. a *venire facias*, and a *habeas corpora juratorum*; see 2 Saund. 280; 2 Wils. 121. And by 24 Geo. 2. c. 48. it is enacted, "that in all writs of dower, *unde nihil habet* after issue joined, it shall not be needful or requisite to have above fifteen days between the teste and the return of the *venire facias*, or any other process to be sued out for the trial of the said issue, but that the writ of *venire facias*, and other process, after issue joined until judgment be given, having only fifteen days between the teste and the return thereof, shall be good and effectual in law as is used in personal action."

† As to the particular pleas which may be pleaded, and the replications replied thereto, see Park on Dower, froms p. 287 to 298; and the forms thereof in Petersdorff's Index Civ. div. p. 120. 121.

prayed to be received; but the Court held, after judgment the lessee could not be received.

4. *ILDERTON V. ILDETON*. T. T. 1793. C. P. 2 H. Bl. 145.

This was a proceeding in dower; the marriage was celebrated in Scotland. There was a plea, that the demandant was never accoupled to T. I., deceased, in lawful matrimony. To this plea there was a replication, which stated a marriage at Edinburgh, in that part of Great Britain called Scotland. On demurrer, assigning for cause that the plaintiff had not laid any place, by way of venue, where the supposed marriage was had,

The Court said, it was anciently the opinion of lawyers, that a jury of one county could not try any matter arising within another county, and a foreign county was almost as formidable a thing, in point of jurisdiction to try, as a foreign country. The place, therefore, in which every alleged fact was done, was to be shown upon the pleadings, that it might be known to what county the jury process should go; and if the facts arose in two counties, or in *confusio comitatum*, that the process might go to both counties. The principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory; and it should seem that neither forms of pleading, nor ancient rules of pleading, established upon a different principle, ought now to prevail. In point of substance, the question on this marriage in Scotland, arising incidentally in a suit in dower, of which we have original jurisdiction, is, for the purpose of this cause, within our jurisdiction, without the assistance of a fiction; and the venue, for the mere purpose of trial, being necessarily the venue laid in the declaration, the inserting it in the replication would have been nugatory, and the want of it can do no harm.

(D) EVIDENCE.*

(E) VERDICT AND WRIT OF INQUIRY.†

(F) DAMAGES.

1. *ROE V. ROE*. T. T. 1775. K. B. 7 Mod. 333.

On a writ of dower the defendant appeared and pleaded *tout temps priet*; upon which there was a writ of seisin and a writ of inquiry of damages. The question was, what damages the demandant was entitled to? The Court held, that she was entitled to damages from the date of the original to the writ of inquiry.

2. *DOBSON V. DOBSON*. E. T. 1734. K. B. Ca. Temp. Hard. 19; S. C. Barnard, 180.

A writ of dower *unde nihil habet*, was brought in the Duchy Court of Lancaster, and judgment was given for the demandant. A writ of seisin was awarded accordingly, and a writ of inquiry; and, on the return of it, damages were given to the widow to the full value of the dower, from the death of her husband to the return of the writ of inquiry. A writ of error was brought in this court; and it was objected, that the damages were improper from the time they were awarded; because these damages were given *a morte viri*, whereas they should not have been, but from the time of suing out the writ of dower, since it does not appear there was any demand of dower in fact. And in Co. Lit. 32. it is said, that the demandant should take care to make demand as soon as possible, lest she lose the value of her dower, and that the heir does no wrong till a demand is made. The Court held if there be no demand it ought to be pleaded.

(G) JUDGMENT.

* The wife should produce witnesses to prove the death of her husband, if it be desired; see Mo. 14.

In dower a remitter to defeat the estate of the husband cannot be given in evidence under *ne unque seise que dower*, but must be specially pleaded, see 1 Dy. 41. pl. 1. So, a recovery in dower will stop the tenant, and all claiming under him, from giving a prior term in a stranger in evidence, see 2 Ld. Raym. 1293.

† The verdict should state, first, the death of the husband seised, and his estate, and time of decease; secondly, the annual value of the land; thirdly, damages for detention; and lastly, the costs; see 2 Saund. 331. 44. e. If the jury do not find a proper verdict, the omission may be supplied by a writ of inquiry; see 1 Leon. 92.

ter plea and judgment for the demandant.

The marriage was celebrated in Scotland. On a plea of *ne unques accouple*, the replication need not state by way of venue that the marriage was consummated in any place in England.

[488]
If a defendant in dower appear and plead *tout temps priet*, the demandant shall have damage from the teste of the original to the writ of inquiry. So, damages from the death of the husband till the widow have seisin, will be given against tenant in a writ of dower *unde nihil habet*, unless he plead no demand of dower made.

1. SPILLER V. ADAMS. H. T. 1721. K. B. 8 Mod. 25.

In dower, there shall be judgment to recover the value and damages.*

In dower it was objected, that though damages might be given in this case, yet it ought not to be given on the judgment, *quod recuperet dotem*, this being in a real action; for before the statute of Gloster no damages were allowed in a real action; therefore the damages ought to be given from the time of the disseisin until after the writ of inquiry returned by the sheriff, if there were no writ of inquiry by the demandant. To which it was answered, and resolved by the Court, that by the statute of Merton, the widow, in a writ of dower, shall recover the value of her dower in damages from the death of her husband to the day that she recovers the dower itself.

2. A. SWORTH V. ROBERTS. T. T. 1660. K. B. 1 Lev. 33.

But a judgment in dower is complete without damages.

Per Cur. In dower the judgment is a complete judgment at common law, without the damages, which are given by the statute of Marlbridge.

3. HARVEY V. H. RVEY. T. T. 1678. K. B. 2 Sh. w. 62.

If the tenant does not appear at the return of the *petit cape*, judgment shall be given for the demandant.

Writ of error on a judgment in a writ of dower in C. P., where the tenant pleads an estate for life, settled on the demandant, and avers it was in lieu of dower, viz. for her jointure. Upon this issue was joined, and at the day in bank the tenant made default; upon that issued a *petit cape*, which, being returned, judgment was given for the demandant.

(II) AMENDMENT.

1. WHELPDALE V. WHELPDALE. T. T. 1683. C. P. 3 Lev. 169.

In dower for three messuages and fifty acres of land, the tenant demurred, and assigned for cause that the third part thereof ought to have been demanded.

Where the writ demanded three messuages instead of the third part thereof, it was holden amendable. So, the record may be amended by the proceedings below.

Wyndham and Charlton, Js., were of opinion that it was amendable; but Levinz, J., entertained a different opinion: observing, that it ought not to be amended, it being a mere ignorance of the clerk to demand three entire messuages, where he ought to demand the third part only, and such ignorance is not amendable; 8 Co. 59. a.

2. WOOD V. BRANDFORD. H. T. 1701. K. B. 7 Mod. 124.

In dower it appeared on record, on a writ of error, that the defendant being an infant had appeared by attorney; it was suggested that there was an admission of a guardian in the court below.

Per Cur. If the case be as represented, it is good cause to amend the record.—See 2 Lev. 33; 2 Saund. 212. 2 Salk. 270; 1 Lev. 181; 1 Mod. 147.

3. FRANCES LADY COBHAM, DEMANDANT, V. MATTHEW TOMLINSON, IN DOWER. E. T. 1670. C. P. T. Jones, 6.

And the record has been amended, notwithstanding a discontinuance appeared.

The demandant counts of 350 acres of land, in the county of Kent, of the tenure of gavelkind, where the custom is, that the wife shall be endowed of the moiety *dum sola et casta vixerit*. The tenant pleads as to fifty acres, parcel of the said land, joint tenancy with J. S.; but does not show by what gift as to 200 acres, other part, a recovery of the defendant, against Sir Henry Heron, and as to fifty acres, the residue of the said 350 non tenure. It was moved that here was a discontinuance as to fifty acres. The question was whether it could be amended?

Archer, J., was of opinion that it could not be amended, and relied on 27 H. 8. s. 1. But Vaughan, C. J., and Wild, J., on the contrary, said that it ought to be amended, being merely *vitium clerici*. Whereupon it was amended.

4. BERN V. BERN. M. T. 1734. K. B. Ca. Temp. Hard. 72.

So, judgment for the demandant was permitted to be amended after a writ of error brought.

A writ of dower was brought in the C. P., in Ireland, and a verdict for the demandant, and judgment thereon. The plaintiff's counsel in error said, that the judgment is erroneous, because there are two amerciements of the tenant, whereas he ought not to have been punished the last time, it being for no default of his, but on the receipt of tenant for years.

Per Cur. The only doubt is relating to the two amerciements at common law; before the statutes 16 & 17 Car. 2. c. 8. if an amerciament was entered

* That is, to recover seisin of a third in severalty, by metes and bounds and the mesne profits and damages; see 2 Sand. 41.

instead of a *capiat*, though it was for the benefit of the defendant, yet, as it by striking was the judgment of the Court, he might assign that for error himself; however, it may be amended under the statute.—Judgment affirmed

out one of two amendments inserted there in.

XI. RELATIVE TO THE FORFEITURE OF.*

DRAINAGE. See tit. *Limitation, Statute of*

DRAMA. See tit. *Copyright.*

DRAWBACKS. See tits. *Excise and Customs; Exportation.*

DRIVING.† See tit. *Action; and ante*, vol. v. p. 55.

[491]

WAYDE V. CARR. H. T. 1823. K. B. 2 D. & R. 255.

Defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damages. The Court held that, it was for the jury to decide the question of negligence, without regard to the law of the road. He brought this action on the case for negligence. The jury found a verdict for the defendant, which it was now moved to set aside; that the defendant had acted, according to the evidence, contrary to the universal law and usage of the road.

Sed per Cur. The question in this case was a question of negligence; of this the jury were the best judges, and independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant. They had acquitted him of negligence, and, having all the circumstances of the case before them, had found their verdict for the defendant; and, therefore, there was no ground for this application.

DRUNKENNESS. See tits. *Deed; Intoxication.*

DUCES TECUM. See tits. *Subpœna; Witness.*

DUEL.

1. **REX V. RICE.** E. T. 1803. K. B. 3 East, 581.

The defendant, a lieutenant in the navy, had sent a letter to his superior officer, provoking him to fight a duel with him, in consequence of certain charges thrown out against him by the other, reflecting upon his character and conduct while serving as an officer under him, and of certain acts done by the superior officer tending to degrade the defendant in the eyes of the crew. The defendant was now brought up for judgment. The Court severely animadverted on the several circumstances of provocation on the part of the prosecutor, which had led to the challenge given by the defendant; but, in passing sentence, said: it is a doctrine not of modern date, but coeval with the first institutions of our laws, that to kill a man in a duel amounts to the crime of deliberate murder. In this case, fortunately for the defendant, the crime he has to atone for is not of so black a dye. He is to receive sentence only for attempting to provoke a duel. The punishment for this offence, as a misdemeanour, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in the offence. They then passed sentence.—See 1 Hale's Pl. 452; 4 Rol. Rep. 360; 3 Bulstr. 171. 172; Foster's Crown L. 296.

The deliberate challenge another to fight a duel, however grievous the provocation,

2. **BEX V. PHILLIPS.** E. T. 1805. K. B. 6 East, 464; S. C. 2 Smith's Rep. 550. [492]

In this case it was alleged, in an indictment, that the defendant unlawfully and maliciously intending to do great bodily harm and mischief to A. B., and to break the peace, &c., wickedly and maliciously did endeavour to stir up, provoke, and excite A. B. to challenge the defendant to fight a duel with him, A. B., by then and there writing, sending and delivering to him, A. B., a scandalous, malicious and provoking letter from the defendant to A. B., to the following effect: "Sir, it will, I conclude from the description you gave of your

Or the offence of endeavouring to provoke another to send a challenge, is an indictable misdemeanour.

* The forfeiture of a dower may arise from the wife's own misconduct or crime; see 5 & 6 Edw. 6. c. 11: as if she be attainted of treason or felony; see 1 Inst. 33. a; 13 Rep. 23; and not pardoned; ibid: or if she alien the land assigned her for her dower, she forfeits it ipso facto, and the heir may recover it by action; see 6 Edw. 1. c. 7.

† By 1 Geo. 4. c. 4. if any person be maimed or injured by the wilful misconduct of drivers of public carriages, the driver is to be deemed guilty of a misdemeanor, and punishable as such by fine and imprisonment. Provided also, that this act shall not extend to hackney coaches.

feelings and ideas with respect to insult, in a letter to C. D., of last Monday's date, be sufficient for me to tell you that in the whole of the Carmarthenshire election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," with intent to stir up, *provoke, and excite the said A. B. to challenge the defendant to fight a duel with him, &c. against the peace, &c.* The question was, whether the count so framed contained in itself a sufficient charge of an offence indictable by the law of the land. The Court, in declaring judgment, adverted to the arguments that had been had recourse to. They said, it has been argued on the part of the defendant, that the allegations in the information amount to no more than this, that the defendant sent a letter to provoke the prosecutor to return him a challenge; and that, although the sending of a direct challenge may, from its immediate tendency to a breach of the peace, be a misdemeanour, yet the endeavour by sending a letter to provoke a challenge, not having an immediate tendency to a breach of the peace, but only a tendency to provoke that which may have a tendency to a breach of the peace, is not such a misdemeanour, unless it appears that a breach of the peace would have followed immediately upon it. *The Queen v. Iangley* (Salk 697. *Ld. Raym.* 29.) has been cited, where it is said that words which tend directly to a breach of the peace, as if one man challenge another, are indictable; and that case has been relied upon to show that they must contain a direct challenge. But in that very case the distinction is taken, that if the words there had been written, the indictment would have laid, for that is a libel. And here we must recollect the provocation to the challenge, and the words which are used, "you have behaved like a blackguard," &c. which are all contained in a letter written by the defendant, and we do not see that, when they have a tendency to provoke a challenge, they are the less indictable because the effect is not directly produced which was evidently intended they should.

3. BROMWICH'S CASE. E. T. 1642. K. B. 1 Lev. 180.

But a person who kills another in a duel,* if he be master of his temper at the time, as if, after the quarrel, he calmly says his shoes are too high, he is, if death ensues, guilty of murder.

And even in the case of a sudden quarrel, where the parties im-

On an indictment against A. B., as second, for being present at the killing of C. D., it was proved that, when the quarrel took place between C. D. and E. F., which was at a tavern, E. F. said, if we fight at this time, I shall have the disadvantage, from the height of the heels of my shoes, and that presently afterwards they went out into the fields, and C. D. was there killed; E. F., the principal, being a peer, he was tried by his peers, and found guilty of manslaughter. On this trial against A. B., the Court said, the evidence was clear of their intention to fight when they went out of the tavern, and the quarrel being only touching words, and they fighting within a little time afterwards, it was held murder, because there need not be the time of night between the quarrel and the fight to make it murder, but such time only as it may appear not to have been done in the first passion; for E. F. had considered the disadvantage of his shoes. The Court directed the jury to find A. B. guilty of murder, but they found him guilty of manslaughter only.

4. MAWGRIDGE'S CASE. Cited Fort. 295.

Words of anger happening, M. threw a bottle with great force at the head of one C., and immediately drew his sword; C. returned a bottle at the head of M., and wounded him, whereupon M. stabbed C. The Court ruled this to

* Killing by fighting may be either murder, manslaughter, or homicide, according to circumstances; first, murder, where two persons deliberately fight a duel, and one is killed; see 1 Hale, P. C. 442; secondly, manslaughter, where the parties fight in the heat of passion, see 3 Inst. 51; and lastly, if two men fight upon a sudden quarrel, and one of them after a while endeavours to avoid any struggle, and retreats, as far as he can, until at length no means of escaping his assailant remain to him, and he then turns round and kills his assailant; in order to avoid destruction, this homicide is excusable, as being committed in self defence; see Fost. 277. But if the person assaulted do not fall upon the aggressor until the affray is over, or when he is running away, this is revenge, and not defence; see 4 Bla. Com. 185. Neither, under the colour of self defence, will the law permit a man to screen himself from the guilt of deliberate murder; for, if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design; see 1 Hale, P. C. 479.

be murder, for M. in throwing the bottle, showed an intention to do some great mischief, and his drawing his sword immediately showed that he intended to follow his blow, and it was lawful for C., being so assaulted, to return the bottle.

5. *REX v. ONEBY*. T. T. 1726. K. B. 2 Stra. 766; S. C. 2 Ld. Raym. 1489.

Upon an indictment for murder, a special verdict was found, disclosing that the prisoner being in company with the deceased and three other persons at a tavern in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half crowns; whereupon the deceased in a jocular manner laid down three half pence, telling Rich that he had set him three pieces; and the prisoner at the same time set Rich three half crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing; to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased, in return, immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over;" and, at the same time, offered his hand to the prisoner, who made answer "No, damn you, I will have your blood." After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "young man, come back; I have something to say to you." Whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked, upon his death bed, whether he received his wound in a manner among sword men called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken upon the facts found in the verdict, and the argument of the chief justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of express malice, after the interposition of the company, and the parties had all sat down again for an hour. Under those circumstances, the Court were of opinion that the prisoner had had reasonable time for cooling; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances; for it must have been implied, according to Mawgridge's case, *ante*, 493. that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of the deceased, made a deadly assault upon him.

But, if in the course of the fight [495] one of the parties in his passion take up a deadly weapon and kill the other with it, it is man slaughter only.

Even tho' it happen some time after the original quarrel took place.*

6. REX v. TAYLOR. T. T. 1771. K. B. 5 Burr. 2793.

The first provocation was in words, and A.'s first answer to them had no harm in them; more abusive words being given to A., without provocation on his part, he struck B., who had given these words, with a small rattan cane. After this B and C. wanted to turn A. out of the public house, when more abusive language was used by C., who, being asked if he were the master of the house, answered, "No, you rascal;" and, as A. was going away, he laid hold of him by the collar and threw him against a settle. Whereupon B. and C. both violently pushed A. out of the door of the house, when A. drew his sword and stabbed C., who immediately died. On the question whether this was murder or manslaughter? the judges decided it was manslaughter only.

7. REX v. SHOW. M. T. 1776. K. B. 1 Leach, C. L. 151.

A. and B. having fought upon a sudden quarrel and separated, A., some time afterwards on his return home passed the prisoner's house, B., who called out to A. "Are you not an aggravating rascal?" on which A. seized B. by the collar. While they were struggling and fighting, B. underneath and A. upon him, A. cried out, "You are a rogue, what do you do with that knife in your hand?" and made an attempt to seize it; and after a great deal of scuffling B. gave a violent blow, on which A. immediately exclaimed, "The rogue has stabbed me to the heart." Upon inspection it appeared that he received three wounds, inflicted by the knife: however, after consideration, the judges held the offence manslaughter.

8. REX v. ENGLAND. Feb. Sess. 1796. Old Bailey. 2 Leach, C. L. 747.

The second to a duel cannot be compelled to give evidence against a principal.†

This was an indictment for murder in fighting a duel. One of the seconds was called to prove the circumstances, but he declined being sworn, for fear he should criminate himself. On the behalf of the crown it was contended, that he might be examined as an accomplice, and that the Court could protect him against any proceedings that might hereafter be instituted against him; but he still declined. And

Per Cur. You cannot be compelled to answer contrary to your inclinations nor can we indemnify you against any ill consequences which may result from your own disclosure; but if you speak the truth we will recommend you to mercy; still it is for you to elect whether you will become a witness or not.

[496]

Duk'g. See tit. *Honour, Title of.*

Dum fuit intra ætatem. See tit. *Infant.*

Dum non compos mentis. See tit. *Lunatic.*

Duplicity. See tits. *Pleas; Replication.*

Duress.‡

1. ANON. T. T. 1661. K. B. 1 Salk. 68.

To constitute duress of imprisonment, the imprisonment must be unlawful.§

A. having no good cause of action, caused B. to be arrested, and to be detained in prison until he made a release, with menaces that he should be there and rot if he would not seal a release; upon which a release was executed, and the man was discharged. Bridgman, C. J., held at N. P. that the release was good because he was in custody in the course of law by the King's writ when he signed it; and being arrested without cause, he might have had an action for it.

* But if two persons fight from malice, and pretend or feign a reconciliation, and they afterwards meet, and suddenly fight upon the score of old malice, and one of them be killed, this is murder; see 1 Hale, P. C. 451. So, if B. challenge A., and A. refuse to meet him, but says, he shall be on his way to a place on business at such a time, and B. meet him in his way and assault him, and they fight, and A. kills B.; if it appear that A. made this communication for the purpose of evading the law by giving the fight an appearance of a sudden quarrel, it is murder; see Hawk. P. C. c. 31. s. 25.

† The seconds are deemed guilty of murder, as being present, aiding, and abetting; see 1 Hale, P. C. 442. But this has been considered as a severe construction by Lord Hale, who thinks that the law in this case was too far strained; *ibid.*

‡ Is either of imprisonment or per minas.

§ Because, if the imprisonment be lawful, and, either to procure his discharge, or on any other fair account, seals a bond or deed, it is not duress of imprisonment; see 2

2. *REX v. SOUTHERTON*. H. T. 1805. K. B. 6 East, 140.

Per Lord Ellenborough, C. J. Where A. & B. having another man in their actual custody at the time, threatened to carry him to gaol upon a charge of perjury, and obtained money from him to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances?

To effect a duress *per minas*, it must be to the person and not his goods.*

3. *SUMNER v. FERRYMAN*. H. T. 1708. K. B. 11 Mod. 202.

A barge was attached on the Thames, by process out of Windsor Court, and the manager or governor of the barge gave a bail bond for his master to appear in Windsor Court to answer on a plea of trespass. The question was, whether this was a bond obtained by duress? The Court held the bond good; and Powell, J., said a man cannot avoid a bond by duress to his goods, but only to his person.

As to threat on a prose [497] cution for penalties.

Durham. See tit. *Palatine*; county of.

Duties. See tit. *Excise and Customs*.

Dwelling-House. See tits. *Burglary*; *Robbery*.

Dyer's. See tit. *Lien*.

Dying Declarations.†1. *REX v. WOODCOCK*. Jan. Sess. 1789. Old Bailey. 1 Leach, C. L. 500. S.

P. *REX v. NADBOURNE*. July Sess. Old Bailey, 1787. 1 Leach, C. L.

460. S. P. *RICHARDSON'S CASE*. Sept. Sess. 1791. Old Bailey. 2 Leach, C. L. 561.

To support an indictment against the prisoner for murdering his wife, her dying declarations, obtained under the following circumstances, were produced:—After the catastrophe she was conveyed to the poor-house, where, after the lapse of some hours, she recovered her senses, when the overseers of the parish sent for the magistrate, who informed her that he had come to take her informations in a legal form, admonished her to speak the truth, and took down her statement in writing in her own words; afterwards read it to her, and she made her mark of approval. It also appeared she died in about 48 hours after her examination; but there was no proof of her having ex-

Before dy^g ing declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved that

Ins^{ts} 481. So, if one imprisoned make an obligation by duress, and after he is at large, takes a defeasance upon it, this will estop him to say it was made per duress; see 3 H. 6. But if a man, taken by virtue of a process issuing out of a court that hath not power to grant it, or in custody on a false charge of felony, and for his discharge gives a bond &c., this may be avoided as taken by duress; see Cro. Eliz. 646; 0 Inst. 97; Allen, 92.

A man shall not avoid a deed by duress of a stranger, for, it hath been held that none shall avoid his own bond for the imprisonment or danger of any other than of himself; see Cro. Jac. 187. But a son shall avoid his deed by duress of the father; and the husband shall avoid the deed by duress of the wife, though a servant shall not avoid a deed made by duress of his master; or the master the deed sealed by duress of his servant. see 2 Danv. 686.

Duress may be given in evidence under the general issue, in assumpsit or debt upon simple contract, but should be specially pleaded in debt on bond, or other specialty; see Com. Dig. Pleader, 2 W. 19.

Therefore, if a man, through fear of death of himself, is prevailed upon to execute a deed, or do any other legal effect, these, though accompanied with all other solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of non-compliance; see 2 Inst. 483. But a fear of battery, though ever so well grounded, is no duress; *ibid*; yet that may be doubted at the present day; see Chit. jun. on Contract, 56. Though it has been adjudged that, if a man makes a deed by duress done to him by taking of his cattle, though there be no duress to his person; yet this deed shall be void; see 2 Danv. Abr. 686.

† By the 3 & 4 Edw. 6. c. 2. no dyer may dye any cloth with orchel or with Brazil, to make a false colour on cloth, wool, &c. on pain of 20s. By 23 Eliz. c. 9. dyers are to fix a seal of lead to cloths, with the letter M to show that they are well mathered, &c., or forfeit 3s. 6d. per yard. By 23 Geo. 3. c. 15. several penalties are inflicted on dyers, who dye any cloths deceitfully, and not throughout, with woad, indigo, and mather; so those dying blue with logwood are to forfeit 20l. Dyers in London are subject to the Inspection of the Dyers' Company, who may appoint searchers; and, out of their limits, justices of the peace in sessions to appoint them, and those opposing the searchers incur 10l. penalty.

‡ These declarations are admissible on account of the solemn obligation which the situation of the party imposes on him to declare the truth; see 1 Stark. Ev. 94.

the deceased, at the time of making them, was conscious of his danger,* which consciousness is to be collected from the circumstances.

pressed any apprehension, or of her seeming sensible of her approaching dissolution. An objection being taken to the admissibility of her testimony;

Per Eyre, C. B., said, the most common species of legal evidence consists in the depositions of witnesses taken in court, in the presence of the prisoner. But beyond this kind of evidence there are also two other species which are admitted by law; the one is the dying declaration of a person who has received a fatal wound; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a justice of the peace by virtue of a particular act of parliament, which authorizes magistrates to take such examinations, and directs that they shall be returned to the court of gaol delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact. In the present case, a doubt has arisen whether the examination of the deceased, taken in writing at the poor-house by the magistrate, is an examination of the nature I have last described. It was not taken, as the statute directs, in a case where the prisoner was brought before him in custody. The prisoner, therefore, had no opportunity of contradicting the facts it contains. It was not in the discharge of that part of the magistrate's duty by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extra judicial act, performed at the request of the overseer; and although it was a very proper and prudent act, yet being voluntary, and under circumstances where the justice was not authorized to administer an oath, must be admitted before a jury with caution; for no evidence can be legal unless it be given upon oath judicially taken. But although we must strip this examination of the sanction to which it would have been entitled, if it had been taken pursuant to the directions of the legislature, yet still it is the declaration of the deceased, signed by herself, and it may be classed with all those other confirmatory declarations which she made after she had received the mortal wounds, and before she died. Now the general principle on which this species of evidence is received is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obliga-

* And it is not essential that the party should apprehend immediate dissolution; it is sufficient if he apprehend it to be impending. Whether such evidence be admissible, is a question for the Court; and not for the jury to determine under all the surrounding circumstances of the case; see East, P. C. 357. Sir David Evans, in 2 Pothier, by Evans, p. 293, has justly observed that, "much consideration should be given to the state of the of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and, therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes, the declaration is a matter of judgment, of inference and conclusion, which however sincere, may be fatally erroneous. The circumstances of confusion and surprise connected with the object of the declaration are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established in evidence, is to be examined with peculiar circumspection; and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative on the sole consideration of its being free from the suspicion of wilful misrepresentation. It is further to be remarked, that this seems to be the only instance in which evidence is admissible against a prisoner, who has not had the power to cross-examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received, except in cases of murder, where, if the dying person were certain as to the author of the violence, yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases, it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for supposing so could have been investigated; they might have turned out to be very unsatisfactory."

tion equal to that which is imposed by a positive oath administered in a court of justice, but a difficulty also arises with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. Upon the whole of this difficulty, however, my judgment is, that inasmuch as she was mortally wounded, and was in a condition which rendered almost immediate death inevitable, as she was thought by every person about her to be dying, though it was sufficient to get from her particular explanations as to what she thought of herself, and her situation; her declarations made under these circumstances ought to be considered by a jury as being made under the impression of approaching dissolution, and therefore ought to be received in evidence.

2. *REX V. DRUMMOND*. Sept. Sess. 1784. Old Bailey. 1 Leach, C. L. 337. And it must

At the trial of this indictment for robbery, the prisoner's counsel informed also appear the Court that a young man of the name of E., very much resembling the that the par prisoner, had been recently executed for robbery, and that he had, previous ty was not to the awful moment of his fate, confessed the robbery under consideration. It incompe tent to have was, therefore, contended to be admissible, because it was the *solemn declara- given evi tion of a dying man*. *Sed per Cur.* The declarations of a dying person are dence on oath; there considered as equivalent to the evidence of the living witness upon oath. fore, the Therefore, as an attainted convict could not have been admitted to have giv- declaration of a felon en testimony on oath; the dying declarations of such person cannot, consis- at the place tently with the rules of evidence, be received; because it would be deem- of execu tion is inad when living. missible.*

3. *REX V. REASEN*. H. T. 1781. K. B. 1 Stra. 499.

The deceased stated the particulars of the injury which occasioned his [500] death, at three several times in the course of the same day, with an interval But dying of about an hour between each; the first and last account had not been writ- declara tions have ten; the second was reduced into writing in the presence of a magistrate, by been admit ted, though the same person to whom the former account had been given; this written it appear statement was retained by the magistrate; and as he had removed to a distant that the de part of the country, and it was not known to what place, the original was not ceased made a sub produced, and an examined copy being rejected, an argument then ensued sequent with respect to the admissibility of the first statement of the deceased. statement

Pratt, C. J., was of opinion, that evidence of the first and third statements statement ought not to be received, considering all three as statements to the same effect, which had and forming one entire narrative, of which the written examination was the been taken best proof. But the other judges were of a different opinion: they held that in writing the three accounts given by the deceased were distinct facts, and that there before a ma gistrate, was no reason to exclude the evidence as to the first and third declaration, such exam because the prosecutor was disabled from giving an account of the second. ation being The witness was therefore directed to repeat his evidence, laying the exami- not ready nation before the justices out of the case, and the first as well as the third state- to be pro duced at ment were admitted. the trial.

4. *WRIGHT V. LITTLER*. M. T. 1729. K. B. 3 Burr. 1244; S. C. 1 Blac. 346.

The plaintiff claimed under a will, dated 1743; the defendant claimed under And this a will, dated in 1745, and proved the hand writing of the witnesses by whom it species of purported to have been attested. To disprove this will, the plaintiff called M., evidence is the sister of W. M., one of the attesting witnesses, and upon cross-examina- admissible tion by the defendant's counsel, she stated that W. M., in his last illness, ac- in civil ca ses. knowledged and declared that the will of 1745 was forged by himself. Upon

* But that of an accomplice is admissible, since the accomplice, if living, might have been examined upon oath; see East, P. C. 354; and in Tinkler's case a majority of the judges held that the death bed declaration of a deceased accomplice was alone sufficient to convict that the prisoner, because the declarant, in that situation, could have no interest in ex-cusing herself, or unjustly charging others: East, P. C. 354. 356.

But, in proof of pedigree, the dying declarations of a party in articulo mortis as to the relationship of [501]

parties, are not admissible.

An easement can not be

And unity of possession extinguishes such a right.

Easter offerings are due of common right, and not by custom only.† Hence, a custom, [502] that every inhabitant of the age of 16,

But a vicar cannot libel the Spiritual Court for a customary Easter offering.

motion for a new trial, Lord Mansfield, C. J., said, as the account was a confession of great antiquity, and as he could be under no temptation to say it, but to do justice, and ease his conscience, I am of opinion that the evidence was proper to be left to the jury. See 6 East, 195.

5. *DOE, D. SUTTON, v. RIDGWAY.* M. T. 1820. K. B. 4 B. & A. 53.

In this cause, in attempting to establish a pedigree, the dying declaration of an individual as to the relationship of the lessor of the plaintiff to the premises last seized were adduced in evidence. They were rejected. The defendant, in consequence, obtained a verdict. A motion was now made for a new trial, but the Court held that the declarations were inadmissible.

Earnest. See tit. *Frauds, Statute of.*

Easement.* See tits. *Common; Grant; Riber; Water-course; Way.*

1. *COOPER v. BARBER.* T. T. 1810. C. P. 3 Taunt. 99.

Per Cur. An incorporeal right, whether by prescription or otherwise, cannot be claimed in land by the owners of the fee simple.

2. *MORRIS v. EDGINTON.* T. T. 1810. C. P. 3 Taunt. 24.

Per Cur. No way, or other easement, can subsist in land of which there is an unity of possession.

Easter Offerings.

1. *EGERTON v. STILL.* T. T. 1725. Ex. Bunb. 178.

It was resolved in this case, that the plaintiff should have Easter offerings as due of common right, although he demanded them as due by custom.

2. *FULLER v. SAY.* M. T. 1649. C. P. Willes, 629.

In the parish of S. there was a custom, that every married man and wife, being of the age of 16, shall pay to the vicar, yearly, fourpence, as for and in the name of Easter offerings. On a prohibition it appeared, that the plaintiff and his wife were Quakers, and that neither of them went to S. church.

Per Cur. By the rubric, "every parishioner is to communicate at least three times in the year, of which Easter shall be one: and yearly, at Easter, every parishioner shall reckon with the parson, &c." We do not think Quakers are exempt.

should pay 4d. yearly is good,† and binding even upon Quakers.

3. *READ v. DEATARY.* H. T. 1733. K. B. 7 Mod. 199: S. C. Barn. 372.

On showing cause why a prohibition should not issue to the Spiritual Court, it appeared the plaintiff below libelled for an annual offering of 7d., payable at Easter, and claimed them as vicar of B. The suggestion for a prohibition was, that the rector was entitled to such payments, and that customs are triable at common law; and of that opinion were the Court. A prohibition was granted.

* An easement is a service or convenience which one neighbour has of another by charter or prescription, without profit; see Kitch. 105. A right to an easement (as to a drain, watercourse, or the like), through the lane of another, being a freehold right, can be created only by deed. But a mere licence for such an easement may be by parol; because, until it be acted upon, it may be countermanded; see 5 B. & C. 221; S. C. 7 D. & R. 783. An easement may also be created by custom; see Cro. Eliz. 362. But uninterrupted enjoyment of an easement for twenty years and upwards is no bar to an action, but is evidence, from which the jury are to be directed to presume a grant; see 2 Saund. 175. The enjoyment must have been with the consent of the owner of the inheritance; see 2 Saund. 175. a; 2 Salk. 422. And, where an easement by prescription is pleaded, another prescription cannot be pleaded in destruction of such easement; see 9 Co. 77^c.

A multitude of persons cannot prescribe for an easement; see Cro. Jac. 170; 3 Leon. 254; 3 Mod. 274; Lib. Abr. 496.

† By 2 & 3 Edw. 6, and by the rubric at the end of the communion office, it is directed, that "yearly, at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them, or him, all ecclesiastical duties accustomedly due, then and at that time to be paid."

‡ So, in *Carthew v. Edwards*, cited 3 Burn. C. L. 21. it was decreed by the Exchequer, that Easter offerings were due of common right, after the rate of two-pence a-head for every person in the defendant's family of sixteen years of age. So, an offering of fourpence for each married householder, three-half-pence for every son, daughter, or other servant, not having wages, and twopence for every servant having wages, if they receive the sacrament was deemed good; see 1 Wood's Dec. 341.

East India Company.*

- I. TRADING BY, p. 502.
 II. OF THE SHIPPING, p. 505.
 III. OF THE OFFICERS, p. 506.
 IV. SALES BY, p. 511.
 V. OF THE WRIT OF *MANDAMUS* AGAINST, p. 510.

I. TRADING BY.

1. *CAMDEN V. ANDERSON*. T. T. 1796. K. B. 6 T. R. 723. Judgment affirmed, 1 B. & P. 272.

In an action on a policy of insurance at and from London to the East Indies, &c. it appeared, that the ship sailed with a cargo of goods belonging to the plaintiffs, the owners, consisting of copper and other articles *not licensed by the East India Company*. At the trial it was stated, that the 33 Geo. 3. c. 52. is an act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with their exclusive trade, under certain limitations, &c. Sect. 71 re-enacts the exclusive trade. Sect. 72 re-enacts all profits, benefits, privileges, power, casualties, rights, remedies, methods of suit, penalties, forfeitures, disabilities, provisions, matters, and things whatever, which the Company had by virtue of any former charter or act of parliament, as if the same were re-enacted in the body of that act, subject to the alterations, &c. contained therein. Sect. 146. repeals so much of the 9 & 10 W. 3. c. 41. as inflicts any penalty or forfeiture for illicit trading to the East Indies; the whole of the 5 Geo. 1. c. 21. and so much of any act or acts as continue the same; so much of the 7 Geo. 1. c. 21. as relates to the punishment or prosecution of persons illegally trading or going to the East Indies; the whole of the 9 Geo. 1. c. 26; so much of the 3 Geo. 2. c. 14. and of the 17 Geo. 2. c. 17. as creates any penalty with reference to the 7 Geo. 1. c. 21; so much of the 10 Geo. 3. c. 47. as subjects illicit traders to or from the East Indies to penalties; so much of the 13 Geo. 3. c. 63. as provides for the delivery of advices to the Secretary of State, &c.; so much of the 21 Geo. 3. c. 65. as prohibits the lending of money to foreign companies, &c.; the 24 Geo. 3. st. 2. c. 25. except, &c.; the 26 Geo. 3. c. 16. except so much as repeals former acts; and so much of the 26 Geo. 3. c. 57. as makes offences against the law for securing the exclusive trade of the Company, &c. enforceable in the East Indies. Sect. 147. provides, that the aforesaid repeal shall not extend to any offence committed against any of the statutes thereby wholly or in part repealed before the passing of the act, &c. but that all and every such offences may be prosecuted, &c. as if the act had not been made. Sect. 150. "For obviating any doubts which might arise how far any of his Majesty's subjects might, notwithstanding the aforesaid repeal of the said several acts, or parts of acts, be entitled to recover any debts due to them in Great Britain or in parts beyond the seas, or otherwise to enforce the execution of any contracts or agreements, by reason of any pretext to be set up by any other person or persons that such debts were contracted, or that such contracts or agreements were made contrary to the prohibitions in the said acts or some of them contained, enacts, that it shall not be competent or lawful for any defendant, in any suit or action then depending, or thereafter to be brought in any court, either in Great Britain or in the East Indies, to plead or set up any act or acts in the whole or in part repealed by that act, in bar of any such suit or action; but that the plaintiff shall have the same remedy and judgment, &c. as if the said acts, or parts of acts so repealed, had never been made, any act or acts to the contrary notwithstanding." It was contended, that as all these

* See 9 & 10 W. 3. c. 44; 5 Geo. 1. c. 21; 7 Geo. 3. c. 57; 9 Geo. 3. c. 24; 13 Geo. 3. c. 9; 15 Geo. 3. c. 44; 19 Geo. 3. c. 61; 20 Geo. 3. c. 19; 21 Geo. 3. c. 65; 22 Geo. 3. c. 51; 23 Geo. 3. c. 36; 31 Geo. 3. c. 40; 33 Geo. 3. c. 52; 35 Geo. 3. c. 115; 50 Geo. 3. c. 86; 51 Geo. 3. c. 75; 53 Geo. 3. c. 155; 54 Geo. 3. c. 55; 55 Geo. 3. c. 116; 58 Geo. 3. c. 83; 59 Geo. 3. c. 122; 4 Geo. 4. c. 81.

† So the provisions in the navigation laws, &c. are not repealed by the 33 Geo. 3.; see 3 B. & P. 604.

transactions happened before the passing of the 33 Geo. 3. c. 52. the illegality of them could not be taken advantage of in this action, for the 146th section repealed all penalties and forfeitures contained in the acts therein specified against such illicit trading, and therefore must be taken to have repealed the same in all other acts, *in pari materia*, if any such existed.

[504] *Per Cur.* It was properly insisted on at the bar, that the legislature only meant, that where the whole act is repealed, no part of it should be pleaded or set up; and that where only a part of an act was repealed, such part should not be set up. The ground on which this opinion proceeds in this case is, that the statute first mentioned, namely, the 9 & 10 W. 3. c. 44. has, from the time when it passed, down to the present moment, been an existing law, operating on the rights of the parties. And though subsequent acts of parliament have continued the prohibitions enacted by that statute, and though some of those acts of parliament have been totally repealed, and others repealed in part, the legislature appear to have anxiously expressed their intention in the 33 G. 3. c. 52. that only that part of the statute 9 & 10 W. 3. which is particularly pointed out, should be repealed. If they had intended to repeal the whole of that act of parliament, and that the prohibitions contained in it should be entirely put an end to, it might have been effected by fewer words than are used to repeal that part of the act. And, on considering the whole of this last act of parliament, it appears to us, that the construction insisted on by the defendant is the fair one; namely, that the legislature meant to repeal the prohibition to lend money to foreign companies, &c., but by no means had it in contemplation either to abridge the monopoly, or to take away any of the consequences of the monopoly given to the East India Company. The words in different acts of parliament show, that the statute of William the Third was always considered as being in force; they speak of continuing the prohibitions. Then, if this be the fair construction of the statutes, the consequence seems inevitable. If the statute of William has never been put an end to, then the policy in question was effected in contravention of that act of parliament, as breaking in upon the monopoly granted to the East India Company; and therefore is void.

And the exclusive trade granted to the East India Company means the inland trade as well as mere exports and imports, and a person going to, or trafficking in, India, without licence, though it be in an independent province, not subject to the Company, may, for such offence, be seized by the Company's servants.

2. NICOLL v. VERELST. E. T. 1778. C. P. 2 Blac. 1277.

In an action for false imprisonment against the servants of the East India Company, for seizing the plaintiff, in order to send him to England, he having been a military officer in the Company's service, but had resigned; it appeared that he was found trading in the territories of a foreign prince, within the East Indies, at the time of such seizure. It was contended that the plaintiff was no offender by trading in the province of Oude, or being found in the dominion of Illahabad, because they were not subject to the Company's control.

Per Cur. The trade intended to be granted by the 9 & 10 W. 3. is the Indian trade, and means the inland as well as mere exports and imports, without critically scanning the meaning of the words *in* and *to*; it is clear that an inland trade must be included in the grant, and cannot be carried on in our own settlements and territories, without excluding interlopers from trading in the adjacent countries, so far as we have the power to do it. The legislature meant to give all it could to the Company. Oude is certainly part of the East Indies, and any person trading there without licence is acting illegally.—Judgment for defendant.

3. BOLTS v. PURVIS. T. T. 1774. C. P. 2 Blac. Rep. 1022.

This was an action of trespass and imprisonment; the pleas were, 1st, not guilty; 2dly, a justification, as captain of an East Indiaman, viz. that he took the plaintiff on board his ship, and brought him to England, in pursuance of an order of the council at Calcutta, he, the plaintiff, having been found there, and being then and there trafficking and trading without lawful authority. The replication set forth certain letters patent from the crown, establishing the court of the mayor and aldermen of Calcutta, and that the plaintiff was one of the aldermen of Calcutta, and as such lawfully authorised to be there. To this the defendant demurred, and assigned for cause, that the plaintiff had not con-

fessed, and avoided, traversed, or denied, that he was trafficking and trading | 505 | in the East Indies. By the Court: The plaintiff in his replication has stated So, being an abundance of matter to show that he was lawfully authorised to be in the East man of Cal Indies; but says nothing as to his trading and trafficking there. The doubt is, cutta, does whether this be material; for whatever is materially pleaded on one side, not author- ize the traf ought to be answered on the other. Now, when the king's charter for esta- bishing the court of the mayor and aldermen was obtained; the trading with- fic and out consent of the Company was an offence by law. The king's charter trading in could not repeal the law, nor annihilate the offence; nor can the making a the East In man an alderman give him an implied leave to exercise an illicit trade. It dies with would be a harsh construction to suppose, that making one an officer of the out licence Company would give him a right to oppose and rival his masters; there may have been an unlawful trading and trafficking, which might authorise the Com- pany to remove him, and he ought, in pleading, either to traverse, or to con- fess and avoid the charge of it.

II. OF THE SHIPPING.

DOLREE V. THE EAST INDIA COMPANY. H. T. 1811. K. B. 13 East, 290.

A question arose in this case, whether under the common printed for of the East India Company's charter parties, the Company were warrant in assist- ing and acting conjointly with his Majesty's government at their requisition, in sending their chartered ships upon a warlike expedition, against the king's East India enemies, under the command of the king's officers. It appeared, that as to the ship which was the subject of this action, alterations had been ordered to be made in her upper works, by the Company, to enable her to carry a larger number of guns, &c. than her stipulated force, and that a king's officer assum- ed the command of her, and hoisted the king's broad pendant on board. The Court observed, that the alterations were made in order to fit the ship more conveniently for the purpose of her intended expedition; and that, as the Com- pany were authorised to employ her in warfare, they must necessarily have the power of fitting her for that purpose; and there was no distinguishing between additional works of that kind, and mere alteration of a rope or plank on board, which it could not be pretended would annul the charter-party. The same an- swer, they said, applied to the placing of the ship under the command of the king's officer; the Company, or those in command, must necessarily exer- cise their discretion in this respect, in the conduct in any warlike ex- pedition in which they were engaged. In answer to an argument that it was the king's warfare, and not that of the Company, as holding an indepen- dent sovereignty in India. Lord Ellenborough said, that whatever distinc- tion might be entertained in India, the Court could make none between the East India Company and the rest of his Majesty's subjects, in respect of any assistance given by them, in warfare, to his government. The Court must therefore consider this as much the warfare of the Company as any other which they might wage. The case stated that the ships and forces of his Ma- jesty and the Company were conjointly employed in the expedition; and there was no previous letting of the ship by the Company to government stated.

III. OF THE OFFICERS.

* If a ship be chartered to the East India Company for the purpose of trade or warfare; and they order her on a voyage of discovery; without the consent of the owners, whereby she is lost, the owners may support an action on the case; *Lewin v. East India Company*, N. P. C. 241; abridged ante, vol. v. p. 341.

The last port intended by the East India Company's charter-parties, when speaking of the allowance of 20*l.* per month during the ship's stay in India, or China, means the port to which she shall be last consigned; *Moffat v. East India Company*, 10 East, 468; abridged ante, vol. v. p. 320.

The 14*l.* stipulated for in the East India Company's charter-parties, in respect of every passenger ordered on board, in India, by the company's agents, is payable, notwithstanding the loss of the ship before her arrival in the Thames; *Moffat v. East India Company*, 10 East, 468; abridged ante, vol. v. p. 300.

1. PARKER v. CLIVE. E. T. 1768. K. B. 4 Burr. 2419. S. P. VERTUE v. CLIVE. M. T. 1769. K. B. 4 Burr. 2472.

A military officer, in the service of the East India Company, has not a right to resign whenever he pleases

This was an action brought by an officer in the military service of the East India Company, against the defendant, who was commander-in-chief of their forces in India, for an assault and false imprisonment. The transaction arose in the East Indies upon a dispute about a perquisite called *bulut*, which was thought proper, by Lord Clive, to be discontinued in future, or, at least, considerably lessened. The officers were exceedingly dissatisfied with this reduction of their pay, or perquisite, which had been allowed to their predecessors, and resented it so highly, that 175 of them threw up their commissions, and quitted the service; of which number Captain Parker was one. Whereupon Lord Clive, as commander-in-chief, imprisoned him, and he was kept four months in custody; but a court martial being called upon the occasion, he was tried by it, and acquitted, as they apprehended him to have a right to resign his commission, and quit the service.

Per Lord Mansfield, C. J. I am of opinion that these military officers in the service of the East India Company were not at liberty to resign their commissions and quit the service at any time and under any circumstances, merely *ad libitum*, whenever they themselves should think fit, or be so inclined. If that were the case, then indeed it would follow, that after resigning their commission, and thereby ceasing to be objects of military jurisdiction, Lord Clive could no longer have any power over them; and accordingly directed a nonsuit, but with liberty to move the Court to set it afterwards aside, without costs. Such motion having been made, the point was argued, and, *per Curiam*, we are all of opinion, "that a military officer in the service of the East India Company has not a right to resign his commission at all times, and under any circumstances, whatsoever, whenever he pleases."

2. BLACKFORD v. PRESTON. H. T. 1799. K. B. 8 T. R. 89.

And an agreement [507] for the sale (by the owner) of the command of a ship in the service of the East India Company, made without the knowledge of the Company is void.

A. B. paid the defendant, who was a shipowner, 5,000*l.*, to procure him the appointment to the command of a ship in the service of the East India Company: in consideration thereof, the defendant promised to repay him, or his representatives, the same sum, when any other person should be appointed to the command of that ship, or of any other ship built upon her bottom. After this agreement was entered into, the ship was lost, with A. B. on board her; and one C. D. was appointed to the ship which was built upon her bottom, for which appointment C. D. paid the defendant a large sum of money. Subsequently, the East India Company came to a resolution, prohibiting the practice of selling the commands of ships, and also made a compensation to some of the officers who had paid for their commands, of whom C. D. was one. But no compensation was made to the representatives of A. B., the resolution not being made in approbation of the practice which had prevailed before. In *assumpsit*, founded on the contract to pay to A. B., or his representatives, by whom this action was brought, the sum of 5,000*l.* on the appointment of a successor, the Court held the contract a fraud on the East India Company, it being entered into in defiance of the salutary regulations which were made by a great commercial company, for the benefit of the country; and said, it was also decided, a few years ago, in the Common Pleas, (1 H. Bl. 327.) that no action could be maintained on an illegal contract, respecting the appointment to an office which is not saleable. And it seems to us; that the principle on which that case was determined must govern the present.

3. ADDERLEY v. COOKSON. H. T. 1809. K. B. 2 Campb. 15.

East India lieutenant returns home on a sick certificate are to pay 1000 rupees, and no more.

In *assumpsit* it appeared that the plaintiff was a captain in an East Indiaman, and the defendant a lieutenant in the company's service, who was returning home on a sick certificate that lieutenants returning home always pay 1000 rupees, and no more, "for their passage and accommodation at the captain's table," in which case their cots swing in the steerage; however the defendant had a cabin to himself; and it was proved that those who have cabins usually pay more.

Per Lord Ellenborough, C. J. Without an express promise, an officer,

under those circumstances, is not liable to pay more than the regulation price; though he has a cabin to himself; and others, for the same indulgence, pay an advanced price; especially as it does not appear that the cabin would have been let to any other person.

4. **REX v. THE COURT OF DIRECTORS OF THE EAST INDIA COMPANY.** T. T. 1815. K. B. 4 M. & S. 279.

By stat. 33 G. 3. c. 52. s. 17. the East India Board of Control is restrained from giving "any directions, ordering or authorising by any dispatch, the increase of the established salaries, allowances, or emoluments, of any governor, &c. or of any officer in the service of the Company, beyond the amount fixed by the present orders, unless such increase be specified in some dispatch proposed by the Court of Directors," &c. By sec. 18. the Board "shall not give any direction for the payment of any extraordinary allowance, or gratuity, from the said revenues, to any person, on account of services performed in India, or on any other account whatever," &c. An officer in the service of the Company supplies the Indian army with rice. The Court of Directors frame a dispatch, directing a payment to be made by the government in India, after a certain rate, and send the dispatch to the Board of Control for their approval. The Board alter the dispatch, substituting a higher rate of payment for the one proposed by the Directors.

In this case the power of the East India Board of Control to interfere with monies awarded Court of Directors, under special circumstances was examined.

The Court held, that the case was not touched by the statute; for, said they, the true meaning of the words "an extraordinary allowance or gratuity" *noscitur a sociis*. We find that the Board of Control is precluded from increasing the established salaries, allowances, or emoluments. Now, what do these words mean. It is plain that they mean the usual permanent advantages attached to the several offices, and permitted to be received by the officers there specified. Is this an increase of any allowance of that nature, that is of the ordinary and understood advantages belonging to any of those situations? We cannot agree that it is, since it seems to us to be nothing more than a compensation to be made to an individual for a quantity of grain taken by the Company; for though the individual was an officer of the Company, it is not an allowance to be made to him in that character:

IV. SALES BY.

EAGLETON v. THE EAST INDIA COMPANY. H. T. 1802. C. P. 3 B. & P. 55.

By an act of the 9 & 10 W. 3. which was passed soon after the institution of the East India Company, and the granting of that monopoly which they still possess, it was enacted, "that all goods and merchandises belonging to the Company to be erected as aforesaid, or any other traders to the East Indies, and which shall be imported into England or Wales, as aforesaid, pursuant to this act, shall by them respectively be sold openly and publicly, by inch of candle upon their respective accounts, and not otherwise," the legislature, at the time that they gave a monopoly to the East India Company, thinking it necessary to secure to the subjects of this country a free and equal opportunity of becoming bidders, at public sales of those commodities which the East India Company alone for a time could import. The case, however, stated that at some time before the passing of the 18th Geo. 2. the regulations under which the East India Company acted in this case took place; but how long before the passing of that statute did not appear. The regulations, as far as they related to the present question, were these:—"And, in case any buyer or buyers of any goods (tea excepted, which is provided for by act of parliament) shall make default in payment of his or their deposit, the goods shall be, as soon after as convenient, resold, and the difference in price, if any, and expenses be made good by the first purchaser, who shall also be rendered incapable of buying again at the Company's candle." Then they proceed: "And in case any buyer shall not make good the remainder of the purchase money on the goods which shall be bought by him, on or before the day limited for the payment thereof, the deposits which have been paid upon the same shall be forfeited to the Company, and such buyer shall be rendered incapable of

The conditions of the East India Company's sales exclude all defaulters from bidding again, until they have rendered damages in an action brought against them for breach of contract.

[509] buying again at any future sale, until he shall have given satisfaction to the Court of Directors; and such person or persons as cannot make themselves known, to the Court of Directors' satisfaction, or to the major part of the Directors present at this sale, shall forthwith make a further deposit, to such amount as shall be required by the said Directors, in part of payment for the goods by him or them bought; and in default thereof, such person shall not be allowed to be a buyer of any goods." But in 18 Geo. 2. (a considerable time after the 10 Wm. 3.), a new regulation took place. Whether the legislature had or had not approved of the former regulations, or whether they thought the East India Company wanted authority to enforce those regulations, did not appear; but for some reason or other, the legislature thought fit not to leave the regulations respecting the article of tea to the East India Company, but to make regulations themselves, and to give the sanction of the legislature to them; and therefore it is enacted in these words, and they are well worthy consideration: "Whereas, many persons do frequently, at sales for tea by the said United Company, bid for, and are declared best bidders, for large quantities of tea, without intending, or being able, to pay for the same, unless such teas should after such sales rise in price, by means whereof the prices of tea are frequently raised, and the running of tea will be encouraged; for remedy thereof, be it enacted, that every person who shall, at any public sale of tea, made by the said United Company, be declared to be the best bidder, shall, within three days after being so declared the best bidder for the same, deposit with the said United Company, or their clerk, or officer appointed for that purpose, forty shillings for every tub and for every chest of tea; and, in case any such person shall refuse or neglect to make such deposit within the time before limited, he shall forfeit and lose six times the value of such deposit, directed to be made as aforesaid; and the sale of all teas, for which such deposit shall be neglected to be made as aforesaid, is hereby declared to be null and void; and all such teas shall again be put up, by the United Company, to public sale, within fourteen days after the end of the sale of teas, at which such teas were sold; and every buyer, who shall have neglected to make such deposit, as aforesaid, shall be, and is, hereby rendered incapable of bidding for, or buying any teas, at any future public sale of the said United Company." This was an action for not being permitted to become a buyer of tea. The plaintiff, it appeared, became the buyer of some tea; had made a deposit; had made default on the day appointed for him to perform his agreement; but afterwards, within a further time given to him by the East India Company, paid the remainder of the purchase money, with interest. The question was, whether the action could be supported.

Per Cur. If we look over the regulations, we shall find that, when they come to speak of the deposit, they say, "In case any buyer or buyers of any goods (tea excepted, which is provided for by act of parliament) shall make default in payment of his or their deposit, the goods shall be, as soon after as convenient, resold, and the difference in price, if any, and expenses, be made good by the first purchaser, who shall be rendered incapable of buying again at the Company's candle;" and then they go on with these words: "and, in case any buyer." It is contended that the word "buyer" there relates as well to the buyer of tea as other articles, notwithstanding the exception. On that point we have great doubts, especially when we come to read the third clause, which cannot possibly apply to tea; because the legislature have told the East India Company what deposit they are to have for tea; and the third regulation is, "that such person or persons as cannot make themselves known to the Court of Directors' satisfaction, or to the major part of the Directors present at the sale, shall forthwith make a further deposit." Taking it for granted, however, that these regulations did relate to tea (except with respect to the deposit, which it is clear must rest upon the act); it is remarkable, that the legislature did not choose to trust the East India Company with the sole power upon that point; for they have given the action as to the forfeiture of six times the value to any informer; and they have gone on to declare that which the

[510]

East India Company thought they had a right to add, as a penalty, to their own regulations respecting other goods, that the person making default shall be excluded for ever from bidding at the Company's sales. But supposing all the regulations subsequent to the rule of deposit to apply as well to tea as to other commodities, and that the purchaser of tea is liable to all the penalties that the East India Company have thought fit to annex, we are still of opinion that upon these words, it is impossible for us to understand the term "satisfaction" in any other sense than a pecuniary satisfaction. It is true that the defaulter is to give satisfaction to the Court of Directors; but the word "satisfaction," as we understand it in a court of law, must mean compensation for default occasioned by the breach of condition. It is impossible for us, unless it were so clearly expressed as that there could be no doubt, to suppose that the word "satisfaction" means, until the defaulter shall obtain the good will and pleasure of the Court of Directors. Upon this ground, therefore, independent of other considerations, we are of opinion that the East India Company had no right to exclude this man from bidding, till he had given what they might think a satisfaction; but only till he should make sufficient reparation for the injury they had sustained by the breach of his agreement with them to pay certain sums of money on certain given days. If they had thought fit to impose this penalty, they should have brought an action against him for not fulfilling his contract; and if he did not pay those damages which a jury might give, we should think they would have authority to exclude him; because that would not be a partial regulation, but would affect all mankind alike; and every man who did not comply would be excluded. Therefore, we are of opinion that, under the circumstances of this case, this action well lies, and that the plaintiff is entitled to recover.

V. OF THE WRIT OF MANDAMUS AGAINST.

1. GRILLARD V. HOGUE. H. T. 1820. C. P. 1 B. & B. 519, S. C. 4 Moore, 313.

A rule nisi had been obtained for a *mandamus* to the court in India, to examine witnesses on behalf of the defendant, in pursuance of the stat. 13 Geo. 3. c. 53, s. 44. which, after reciting that his Majesty's subjects were liable to be defeated of their several rights, titles, debts, dues, demands, or suits, for which they had cause arising in India against other subjects of his Majesty, and for preventing such failure of justice, enacted "that when and as often as the India Company, or any person or persons whatsoever, shall commence and prosecute any action or suit at law or in equity, for which cause hath arisen, or should hereafter arise, in India, against any other person or persons whatever, in any of his Majesty's courts of Westminster, it shall and may be lawful for such court respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus*, or commission to the chief justice and judges of the Supreme Court of Judicature for the time being, or the judges of the Mayor's Court of Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action. It was urged, that the court was not authorised to grant a *mandamus*, or commission, on the application of a defendant, in a case of this description; as by the 44th section, persons commencing or prosecuting actions at law are only entitled to have such writ awarded; and a distinction is drawn between civil suits and criminal proceedings; for by section 40. it is enacted, "that in all cases of indictment, or informations laid or exhibited in the Court of King's Bench, for misdemeanors or offences committed in India, it should be lawful for his Majesty's said court, upon motion, to be made on behalf of the prosecutor, or of the defendant, to award a writ of *mandamus*, requiring the chief justices and judges of the said Supreme Court of Judicature for the time being, who were thereby respectively authorised and required accordingly to hold a court with all convenient speed for the examination of witnesses, and re-

A *mandamus* will be granted under the 13 Geo. 3. c. 53. to the court in India, to examine witnesses on behalf of the defendant in a civil action. [511]

ceiving other proofs concerning the matter charged in such indictment or information respectively.

Sed per Cur. It seems to us necessary to consider, in the first place, what the statute has provided for; if the enactment be express, the Court cannot go into an equitable construction of it, neither can they interfere; and if the defendant is thereby placed in a different situation from the plaintiff, it appears to us, both from the justice of the case and the intention of the legislature, that both a plaintiff and defendant may have a similar remedy in civil proceedings as was expressly given them in the cases of indictment or information, although the 44th section is not framed in so express terms as the 40th. Of the justice of the case there can be no doubt. Both parties should stand on an equal ground. Let the rule be therefore made absolute.

2. FRANCISCO V. GILMORE. M. T. 1797. C. P. 1 B. & P. 177.

But a *mandamus* to examine witnesses

[512]
in India, pursuant to stat. 13 G. 3. c. 63. s. 44. does not lie where the suit is by an Indian mariner for wages in respect of a voyage undertaken since his arrival here from England to the West Indies.

A. B., a captain of an India country trader, contracted in India with C. D. for a crew, according to the custom of the country. A. B. arrived in England with the crew, and then made a voyage with them to the West Indies and back again. This action was brought by part of the crew, for wages due on the West India voyage. A motion was made for a *mandamus* to examine witnesses in India. The Court held that the cause of action did not arise in India, within 13 Geo. 3. c. 63. s. 44. by which it is enacted that, when and as often as the India Company, or any person or persons whatsoever, shall commence or prosecute any action or suit in law or equity, for which cause hath arisen, or shall hereafter arise, in India, against any other person or persons whatsoever in any of his Majesty's Courts at Westminster, it shall and may be lawful for such court respectively, upon motion then made, to provide and award such writ or writs in the nature of a *mandamus*, or commission, to the chief justice and judges of the Supreme Court of Judicature for the time being, or the judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such case or action.

Ecclesiastical Persons and Courts.

I. PERSONS.

(A) RELATIVE TO THE DIFFERENT KINDS OF, AND THEIR PARTICULAR RIGHTS, PRIVILEGES, AND DISABILITIES.

(a) Archbishops and Bishops, p. 514. (b) Archdeacons, p. 518. (c) Canons and Prebendaries, p. 518. (d) Churchwardens, p. 520. (e) Curates, p. 520. (f) Dean and Chapter, p. 522. (g) Lecturer, p. 523. (h) Parish Clerk, p. 523. (i) Reader, p. 523. (j) Visitor, p. 523.

(B) RELATIVE TO APPROPRIATE BENEFICES, p. 523.

(*B) RELATIVE TO THEIR DUTY TO RESIDE WITHIN THE PARISH, &c., AND OF THE PENALTY INCURRED BY NON-RESIDENCE.

(a) To whom applicable, and excuse for non-residence, p. 525. (b) License for non-residence, p. 529. (c) Certificate for non-residence, p. 530. (d) Action for.

[513] 1st. Before what tribunal suable, p. 530. 2d. Declaration, p. 531. 3d. Pleas, p. 531. 4th. Evidence, p. 531. 5th. Staying proceedings, p. 533.

(C) RELATIVE TO THEIR RIGHTS, p. 534.

(*C) RELATIVE TO THEIR PRIVILEGES.

(a) Exemption from offices, p. 535. (b) As to grants by, p. 535. (c) As to leases by and to, p. 535.

(D) RELATIVE TO THEIR LIABILITIES, p. 536.

(E) RELATIVE TO THE LAWS BY WHICH THEY ARE GOVERNED, p. 537.

II. COURTS.

(A) RELATIVE TO THE DIFFERENT KINDS OF.

(a) Arches, p. 537. (b) Archdeacon, p. 537. (c) Audience, p. 537. (d)

Consistory, p. 533. (e) Convocation, p. 538. (f) Delegates, p. 538. (g) Faculties, p. 533. (h) Prerogative, p. 538.

(B) RELATIVE TO THE JURISDICTION OF.

See *tits*. Administration; Adowson; Churches and Chapels; Churchwardens; Customs; Devise; Distribution; Donatio Causa Mortis; Ejection; Guardian and Ward; Legacy; Libels; Marriage; Offices; Overseers; Penal Statutes; Pensions; Powers; Proctor and Apparitor; Simony; Sander; Tithes; Trespass; Wills.

(C) RELATIVE TO PROCEEDINGS IN, HOW FAR EVIDENCE IN COURTS OF LAW, p. 538.

(D) RELATIVE TO PROVING THE PRACTICE OF, p. 539.

(E) RELATIVE TO THE LIABILITY OF THE JUDGE OF, FOR AN EXCESS OF JURISDICTION, p. 539.

I. PERSONS.

[514]

(A) RELATIVE TO THE DIFFERENT KINDS OF, AND THEIR PARTICULAR RIGHTS, PRIVILEGES, AND DISABILITIES.

(a) *Archbishops and bishops.**

1. TRELAWNEY V. THE BISHOP OF WINCHESTER. H. T. 1756. K. B. 1 Kenyon, 256; S. C. 1 Burr 219.

In an action of debt brought by the plaintiff against the defendant for 600*l*. for five years' salary, due for several offices; viz. great or chief steward to the bishopric and all its castles, lordships, manors, &c., and conductor of the men and tenants of the bishop thereof, with a salary of 10*l*. per annum, and of master-keeper or preserver of the wild beasts in all the forests, &c. belonging to the bishop, and chief governor of all birds, &c. which was commonly called chief parker, with a salary of 20*l*. per annum. These offices, &c. were

An ancient office with a salary usually granted for life before the 1 Eliz. c. 19. may be granted by a bishop as a statute.

* Bishop is derived from the Saxon word "biscop," an overseer, or superintendent, so called from that watchfulness and faithfulness which, by his place and dignity, he hath and oweth to the church; see Godol. 22. An archbishop is the chief bishop of the province; who next and immediately under the King, hath supreme power and jurisdiction in all causes and things ecclesiastical: see Godol. 12. There are within the kingdom only two archbishops of the provinces of Canterbury and York: see Co. Lit. 94. a. Each archbishop hath, within his province, bishops of several dioceses. The Archbishop of Canterbury hath under him, within his province, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David, Bangor, St. Asaph, and four founded by King Henry VIII. created out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The Archbishop of York hath under him four, namely, the bishop of the county palatine of Chester, Durham, Carlisle, and the Isle of Man: see 1 Inst. 194.

The archbishops have the style and title of Grace and Most Reverend Father in God by Divine Providence. The bishops that of Lord and Right Reverend Father in God by Divine Permission.

Formerly, bishoprics were elective by the clergy and people; see Ayl. Par. 126. But now now the right of donation is in the King; see 1 Inst. 124.

Bishops ought to be personally resident, to take care of their particular provinces, and for the comfort of the churches espoused to them, especially on solemn days in Lent and Advent, unless their absence is required by their superiors, or for other just cause; see Athen. 118.

By 25 Hen. 8. c. 20. a bishop, upon his election, shall be deputed and taken as lord elected. And, by divers other statutes, bishops are called peers of the land; see 1 Inst. 1. It has been asserted, that a statute made where bishops have not been present is not good. But this has been contradicted by Lord Coke; see 1 Burn. E. L. 213. A bishop has three powers; 1st. His power of ordination, which is gained on his consecration, and not before, and thereby he may confer orders, &c. in any place throughout the world, 2nd. His power of jurisdiction, which is limited and confined to his see. And lastly. His power of administration and government of the revenues; both of the latter powers he gains by his confirmation; and some are of opinion that the bishop's jurisdiction, as to ministerial acts commences on his election; see Palm. 472.

The right of trial by the lords of parliament, as their peers, it is said, does not extend to bishops who, though they are lords of parliament (except Sodor and Man), and sit there by virtue of their baronies, which they hold jure ecclesiæ, yet are not ennobled in blood, and, consequently, not peers with the nobility; see 1 Inst. 30; 1 Bla. Com. 40. Archbishops and bishoprics may become void by death, deprivation for any very gross and notorious cause, and also by resignation. All resignations must be made to some superior. Therefore, a bishop must resign to his metropolitan; but the archbishop can resign to none but the King himself; see 1 Bla. Com. 382.

granted to the plaintiff by the late bishop of Winton, by letters patent, for life. On issue joined between the parties, the jury found a special verdict; and the question that came before the court on such verdict was: Whether J. T., the grantee, was entitled to hold the two first mentioned offices, and to recover those arrears against the present bishop. As to the office of chief parker, it was given up by the plaintiff's counsel. After hearing counsel on both sides on this question, the Court gave their opinion.

Per Cur. We are all unanimously of opinion, that an office and fee which existed before statute 1 Eliz. is not within such statute, but may be granted since precisely in the same manner as it was granted before; and that the utility or necessity of such an office is no more material since that statute than it was before; and we think this opinion agreeable to the words and intent of the statute, and to every precedent made since; therefore the plaintiff must have judgment.

[515] 2. REX V. THE BISHOP OF OXFORD. E. T. 1806. K. B. 7 East, 345; S. C. 3 Smith's Rep. 241.

A *mandamus* to a bishop to grant a license to a curate must show that the party applying for it is entitled to the relief prayed.

This was an application to quash a writ of *mandamus*, which had been granted, directed to the ordinary to license a curate, on the ground that its insufficiency was apparent upon the face of it, inasmuch as it neither suggested a custom for the inhabitants to elect a chaplain, who was entitled to the use of the pulpit without the consent of the rector, nor the consent of the rector in case there was no such custom; without one or other of which the *mandamus* would be against common right, and nugatory.

Per Cur. The writ must be quashed. This is a writ by which a party is required to do that which he has hitherto forborne to do in breach of some duty. The facts to be stated in the writ are, therefore, those which constitute the duty. It ought to state such facts as *prima facie* throw the obligation upon him to do what is required of him.

3. REX V. THE ARCHBISHOP OF CANTERBURY. H. T. 1807. K. B. 8 East, 213.

And a *mandamus* will [516] not lie to the Arch-bishop of Canterbury to procure the admission of a person as a doctor of civil law.

A rule was applied for to show cause why a *mandamus* should not issue, directed to the Archbishop of Canterbury, to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the Court of Arches.

Sed per Cur. There ought, in all cases, to be a specified legal right, as well as the want of a specified legal remedy, in order to found an application for a *mandamus*; but here nothing appears to show that the applicant has any legal right to what he claims, more than any other of his Majesty's subjects. Therefore, however sorry we may feel for the disappointment of the individual who has consumed his time and substance in a fruitless pursuit, we cannot interfere.

See 1 Show. 217; 3 Mod. 332; 1 Lev. 75; 2 Str. 893; Bac. Abr. (G.) 198; 2 Roll. Abr. 285; 1 Str. 58; 1 Vent. 143; 2 Str. 1114; 3 Burn's E. L. 319. tit. Sexton; 1 Salk. 166.

4. REX V. THE ARCHBISHOP OF CANTERBURY AND THE BISHOP OF LONDON. M. T. 1812. K. B. 15 East, 117.

The judgment of the bishop is conclusive

A rule had been obtained for a *mandamus* to the archbishop of London, to license a clerk chosen by the inhabitants of St. Bartholomew, Exchange, London, to an endowed lectureship in the parish church there. This produced

In Ireland there are four archbishops; Armagh *primate* of Ireland, Dublin *primate* of Ireland, Cashel *primate* of Munster, and Tuam *primate* of Connaught; and eighteen bishops, viz. Meath, Kildare, Derry, Raphoe, Limerick, Ardfer, Ardfer and Agdoo, Dromore, Elphin, Down and Connor, Waterford and Lismore, Leighlin and Ferns, Cloyne, Cork and Ross, Killaloe and Kiltenera, Kilmora, Cloghor, Ossory, Killala and Achonry, Clonfert and Kilmadagh.

In Scotland, after the reformation, the titles of archbishop and bishop were introduced in 1572, and bestowed on clergymen ordained members of cathedral churches. By the act of 1592, c. 116 Presbyterian church government was established by kirk sessions, presbyteries, provincial synods, and general assemblies. By act 1606, c. 2, bishops were restored. But, in 1638, presbytery was a second time introduced. By act 1661, c. 1, presbytery was again displaced by prelacy. And, finally, by acts 1689, c. 3, and 1690, c. 5, s. 29, presbytery was re-established, and has since so continued.

an affidavit by the bishop, that the party elected had been admitted before him on ques-
 with a view to his being "approved and licensed," (which are the words of tions of
 the stat. 13 & 14 Car. 2. c. 4. s. 19. imposing that function upon the archbish- qualifica-
 op or bishop, before any lecturer may lawfully preach,) that he had made dili- tion for lec-
 gent inquiry respecting his conduct and ministry; and, being convinced, from tureships.
 such inquiry, that *he was not a fit person* to be allowed to lecture, he had con-
 scientiously determined, after having heard him, *that he could not approve or*
license him thereunto. Under these circumstances the Court now discharged
 the rule, observing: There is no instance of such an application for a *man- la-*
mus to compel a bishop to *approve*; we can only compel him to *inquire*. We
 cannot divest him of that function which the legislature has, for wise purpos-
 es, vested in him, and transfer it to ourselves. All that the Court can ever do,
 is to see that that function is well executed by him in whom it is so vested; and
 there never yet has been an instance of a *mandamus* to compel a bishop to ap-
 prove and license a lecturer where the question turned on the approbation or
 disapprobation of the bishop as to the fitness of the applicant. It has been
 urged, however, (and much stress was laid upon it in the argument,) that it
 was the duty of the bishop to have instituted his inquiry upon the subject in
 the manner and by the means usually adopted in courts of law; that is, by the
 formal production of the charges made against the applicant in a judicial
 course, and by a public and solemn hearing of the several parties, their proofs,
 and witnesses. But, in the first place, what power has the bishop to compel
 the attendance of parties and witnesses? What power has he to administer
 an oath; or what word is there in the act of parliament that prescribes the
 mode by which he shall attain a conscientious satisfaction on the subject? It
 only requires him first to approve; that is, before he licenses. A strict analo-
 gy does not hold between the means of obtaining a licence for a lectureship
 and the other situations in the church to which it has been compared. Nor is
 a lectureship, in point of right, like the case of a temporal inheritance in an [517]
 advowson, or the like, where the patron is entitled to call upon the ordinary
 to institute his clerk, and to enforce that right by *quare impedit*, unless the
 bishop specifically states in his plea some reasonable cause wherefore the
 clerk presented is not fit. In the statute of *articuli cleri*, which is not merely
 an enacting statute, but, as Lord Coke says, declaratory of the common law
 and custom of the realm, the 13th chapter runs thus: "Also it is desired, that
 spiritual persons, whom our lord the king doth present unto benefices of the
 church (if the bishop will not admit them, either for lack of learning, or for
 other reasonable cause,) may not be under the examination of lay persons in
 the cases aforesaid, as it is in these times in fact attempted, contrary to canon-
 ical decrees; but that they may sue to an ecclesiastical judge, to whom it of
 right belongs, for the obtaining remedy as may be just. "The answer is," of
 the fitness of a parson presented to an ecclesiastical benefice, the examination,
 "it will be recollected, that examination" is not the term in the statute 13 &
 14 Car. 2. but approved; and the word examination, taken strictly, may be
 understood to mean a personal oral examination, such as usually takes place
 for the ascertaining a competence in literature "The examination," it says,
 "belongs to the ecclesiastical judge; and so it has heretofore been used. and
 shall be so in future: a lectureship has been likened to that of a perpetual cu-
 racy. There, unless the curacy, by being augmented by Queen Anne's
 bounty or otherwise, becomes a presentable benefice, for which a *quare impe-*
dit lies, the only legal remedy which the curate has is by *mandamus*. But here
 I would refer to the canons for the authority and duty of the bishop in respect
 to curates, and to the statute in respect to lecturers, to show the difference be-
 tween the two cases. By the 48th canon, "no curate or minister shall be
 permitted to serve in any place, without examination and admission of the
 bishop of the diocese, or ordinary, &c. It appears, then, that there is to be
 an examination by the bishop, which is to precede the admission of the curate;
 which duty of examination is cast upon him by the express terms of the canon;
 and, therefore, if the bishop either will not examine at all, or only in a mode

altogether ineffectual for the purpose for which such an examination is required; if, in short, he should appear to refuse or elude the performance of this express duty, the Court will interfere by *mandamus* to compel such an examination to be made as appertains to his duty. But in this case, it will be recollected, that examination which may be understood to be such as takes place in cases of institution to benefices is expressly enjoined by the canon. But in the instance of the lecturer, the term "approbation" in the statute 13 & 14 Car. 2. is quite another thing. What scales have we to weigh the conscience of the bishop? and how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge, for the habits of life and conversation of the person, which might be known to him from residing in the same university, or society, with him, from his conduct in life down, perhaps, to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? It seems to us, therefore, that unless we repeal the act of parliament, and violate the functions that are exclusively vested in the bishop and others under the act, we cannot grant the *mandamus* that is prayed for; and that, in refusing it, we contravene no principle of law that has ever been established, nor run counter to any one *dictum* of any one judge, pronounced in any cause in which a question of this nature, respecting the exercise of the functions of a bishop, has ever occurred before the Court.

[518]

5. HARRISON v. AUSTIN. T. T. 1683. K. B. Comb. 131.

A bishop may sue before his own commissary.

On motion for a prohibition, it was suggested, that the bishop had libelled for a pension before his own commissary; and, if it were allowed, he would be judge in his own cause. But the Court refused the prohibition, because a suit lies before a chancellor in such case; and it had been holden, that a lord might be sued before his own stewards.

(b) *Archdeacons.* See *ante*, vol. ii. p. 267.(c) *Canons and prebendaries.**

1 BISHOP OF CHICHESTER v. HARWOOD. E. T. 1787. K. B. 1 T. R. 650.

There is no lapse to the bishop in the case of a canonry; *semble*, the bishop by virtue of his visitatorial power, has no right to appoint *pro tem* in default of appointment, by the dean and chapter.

The suggestion upon a prohibition to the Bishop of Chichester, stated, that the right of election of a canon residentiary vested in the dean and chapter, that the bishop is not a visitor as to such elections, nor has any visitatorial power or jurisdiction over the dean and chapter in that respect, nor has any right to appoint to the vacant place and office of a canon residentiary by lapse or otherwise. It also disclosed, in March, 1781, the office of one of the canons residentiary became vacant; that in August, 1784, the dean and chapter met to elect, but being divided in opinion no election was made; that in January, 1785, the bishop, by his monition, cited the dean and chapter, to show why they had not filled up the vacancy, and why he, the bishop, should not by his power visitatorial fill up the said vacancy which had devolved upon him by default of the chapter in not filling up the vacancy in due time.

Per Cur. It has been resolved that a *mandamus* will lie to compel the dean and chapter to fill up a vacancy among the canons residentiary, and that there is no lapse to the bishop in the case of a canonry. This is not a mere spiritual office, but a freehold attended with temporal advantages; the persons electing, indeed, to it, being all ecclesiastical persons. The question now is, whether the bishop can take the right of election out of the hands of the dean and chapter into his own? We are clearly of opinion that he cannot do so. Rule absolute for prohibition.

[519]

The admission of a canon into

2. GARNETT v. GORDON. H. T. 1813. K. B. 1 M. & S. 265.

It appeared that a statute was made in 1663, by the bishop, with the con-

* A prebend is an endowment in land on pension, in money given to a cathedral or conventicle church in prebendum, that is, for the maintenance of a secular priest, or regular canon. A canonry also is a name of office, and a canon is the officer in like manner as a prebendary; and a prebend is the maintenance or stipend both of the one and of the other see Gibs. 172: 2 Burn. E. L. 88.

sent of the chapter of Exeter, conferring upon every canon residentiary, who should cease to be such by promotion to a higher degree and dignity in the church of England (unless it be by voluntary resignation, &c.) the right of receiving to his own use the whole profits and advantages of the canonry for the following year. The defendant, who was dean and canon of that chapter, signed the same, in order to obtain promotion to another deanery, to which he was shortly afterwards promoted. The plaintiff was elected, admitted, and installed a canon residentiary (to wit), "into the place void by the resignation of the defendant;" and, after having completed one year's residence, was, on his application, by an act of the chapter, pronounced full residentiary in the said church, and capitularly admitted a full residentiary. The defendant received by the hands of the chapter's clerk part of the profits of the said canonry, which accrued subsequently to such his resignation, and subsequently also to the plaintiff's election, admission, and installation aforesaid. This action was brought to recover the sum so received by the defendant. It was objected, that the plaintiff could not maintain the action in respect of the profits accruing before he was *capitulanter admissus in plenum jus*, which did not take place until after one year's residence; but the Court said, that the plaintiff was admitted into *plenum jus* before the commencement of the action, and that such admission would relate back to the time when his title accrued.

3. *REX V. DEAN AND CHAPTER OF NORWICH.* H. T. 1718. K. B.

1 Stra. 159.

On a *mandamus* to admit to a prebend of the church of N. The writ suggested that Queen Anne, by letters patent, 26th April, 13th of her reign, incorporated Dr. Sherlock, then Master of Catherine Hall, in Cambridge, and the fellows and scholars for ever; and grants that the then master (naming him) should succeed to the next vacancy of a prebend in Norwich, and his successors, masters of Catherine Hall, after him, requiring the dean and chapter to assign him *stallum in choro et vocem in capitulo prout mos est*; which letters patent were confirmed by the statute 12 Ann. against mortuaries. And one of the prebendaries being now dead, this is the first vacancy, to which the dean and chapter are required to admit Dr. Sherlock: they return that King Edward the Sixth, by letters patent, 7th of November, first year of his reign, erected a deanery and chapter of Norwich into a corporation, and endowed the church, and gave them perpetual succession. That neither he, nor Queen Mary, or Queen Elizabeth, ever made any statutes for the government of the corporation. But King James, by a body of statutes, ordained, that as often as there should be any vacancy, the dean and chapter should admit such person as the king should nominate under the great seal. And, further, (which is the clause upon which the question arises) that none should be admitted to be dean or prebendary, who before was prebendary of any other cathedral church. And that these are the statutes which they have sworn to observe. And for that Dr. Sherlock is dean of Chichester, and a prebendary of St. Paul's, they refuse to admit him, *et ob nullam aliam causam*.

Per Cur. The return is insufficient, a peremptory *mandamus* must go.

4. *REX V. BISHOP OF CHESTER.* H. T. 1747. C. P. 1 Wils. 206.

On a rule for a *mandamus*, commanding the bishop to restore the reverend A. B. to the place and office of one of the prebendaries of the church of C. The bishop returned that A. B. ought to be punished, expelled from, and deprived of his canonry or prebend for fornication and incontinency, which had been decreed in the bishop's Visitorial Court.

Per Cur. The bishop may exercise his visitorial power, without admonishing the party three times, where it does not appear whether there is a visitor or not; this court has granted a rule to show cause; but when it appears there is a visitor, this Court cannot intermeddle, and we think the bishop had jurisdiction, notwithstanding the statute *de corrigendis*, &c.

(d) *Churchwardens.* See ante, vol. v. tit. *Churchwardens.*

(e) *Curates.*

1. MARTYN v. HIND. E. T. 1776. K. B. Cowp. 440.

An unlicensed, and not a licensed, curate is removeable at pleasure.

Per Mansfield, C. J. There is a distinction between curates licensed, and curates not licensed; if not licensed, they are removeable at the pleasure of the incumbent; but, if licensed, they are only removeable *sub modo*, for instance, by the consent of the bishop, or where the rector does the duty himself.

2. MARTYN v. HIND. E. T. 1776. K. B. Cowp. 440; S. C. 1 Doug. 141.

It has been decided, that if a rector give a person a title to the bishop, by which he appoints him curate of his church, and under takes to continue him and pay him a salary, till he shall be otherwise provided for by some ecclesiastical preferment, or, for fault by him committed, lawfully removed, he cannot remove him, without cause.

The declaration stated, that the defendant, on the 13th of Feb. 1769, by an instrument in writing, undertook and promised "to retain and continue the plaintiff to officiate as curate in the parish church of St. Ann, Westminster, until otherwise provided of some ecclesiastical benefice," unless, by fault by him committed, he should be lawfully removed; and to pay him fifty guineas a year during that time; that the plaintiff had not been provided of any other ecclesiastical preferment, nor lawfully removed, and that the defendant had not, from the said 13th of February, 1769, retained and continued him curate of the said church, and permitted him to officiate therein, and had not paid the fifty guineas a year, &c.—*Plea, non assumpsit.*—The instrument on which the action was brought, was called a title, and was in substance, as follows: "To the bishop of London. These are to certify to your lordship, that I, R. H., rector of St. A., do hereby nominate and appoint the reverend T. M., to perform the office of a curate in my church of St. A., and do promise to allow him the yearly sum of fifty guineas, for his maintenance in the same, and to continue him to officiate in my said church until he shall be otherwise provided with some ecclesiastical preferment, unless by fault by him committed, he shall be lawfully removed from the same;" the case then stated, that on the 6th of July, 1778, the church of St. A. had become vacant, on the defendant's having taken other preferment, and that he had paid the plaintiff his salary, as curate, up to that time. The question upon the case reserved was, whether the plaintiff could recover the arrears of his salary, from the time of the defendant's quitting the rectory of St. A.?

Per Cur. There does not seem to me to be any colour whatever for the present demand. The question is, what has H. undertaken to do? He could not turn the plaintiff out at pleasure, but there is no pretence to say that he has undertaken for himself, or his executors, to maintain him for life, or to continue all his own lifetime rector of St. A. The point here is not, whether this is a good title or not; although it should seem that it is good. They commonly run in this form, and the curate takes the risque of the rector's quitting the living. A man may give a more permanent title, but the words of this instrument clearly confine the undertaking to the time of H.'s continuing rector of St. A. "I nominate," &c. "to the office of a curate of my parish of St. A." &c.—*Postea* to the defendant.

3. DOE, D. GRAHAM, v. SCOTT. M. T. 1809. K. B. 11 East, 477.

A curacy is augmented by the mere order for augmentation.

The question in this case was, whether there was sufficient proof of a curacy having been augmented. An order for the augmentation of it was shown, entered in a book, and signed by the governors, according to the 1 Geo. 1. st. 2. c. 10. s. 20. It was not, however, shown that the money was afterwards laid out in land, and allotted by deed, under the corporation seal of the governors of Queen Anne's bounty, to be annexed to the curacy; and that such deed was enrolled within six months after its execution, according to the statute 1 Geo. 1. st. 2. c. 10. s. 21.; and 9 Geo. 2. c. 36. But Lord Ellenborough said, is not the curacy augmented, when the money is appropriated by the go-

* A curate represents the incumbent of a church parson or vicar, and takes care of divine service in his stead; in case of pluralities of livings; or where a clergyman is old and infirm, it is requisite there should be a curate to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an ordinary having episcopal jurisdiction; and, when a curate hath the approbation of the bishop, he usually appoints the salary too; and, in such case, if it be not paid, the curate has a remedy in the ecclesiastical court, by sequestration of the profits of the benefice; but, if he has no license from the bishop, he is compelled to seek his remedy at common law; see Tomlin's Law Dict. tit. Curate.

vernors to that purpose, even before it is laid out in land, which may not be for some time afterwards? The words of the 36 Geo. 3. c. 84. are general, [522] that all churches, &c. which shall be augmented by the governors of Queen Anne's bounty, shall be benefices, so that the license thereto shall render voidable other livings, &c.

(f) *Dean and Chapter.*

DEAN AND CHAPTER OF DURHAM V. THE ARCHBISHOP OF YORK. M. T. 1672. Of common right, the dean and chapter* are guardians of the spiritualities during the vacancy of a bishopric; but by custom, the archbishop is in the suffragan diocese. K. B. 1 Vent. 225.

In a prohibition, the archbishop pleaded a prescription, that he and his predecessors have, time out of mind, been guardians of the spiritualities of the bishoprick of Durham, *sede vacante*; and thereupon issue was joined.

Per Hale, C. J. *de jure communi*, the dean and chapter were guardians of the spiritualities during the vacancy, as to matters of jurisdiction; but for divination, they are to call in the aid of a neighbouring bishop. But the usage, here in England, is, that the archbishop is guardian of the spiritualities in the suffragan diocese, and therefore it was proper here to join the issue upon the usage.

(g) *Lecturer.* See also *ante*, 516.

REX V. FIELD. H. T. 1791. K. B. 4 T. R. 125. S. P. REX V. BISHOP OF LONDON. T. T. 1786. K. B. 1 T. R. 331. S. P. REX V. BISHOP OF EXETER. T. T. 1802. K. B. 2 East, 462.

On a rule to show cause why a *mandamus* should not issue to the defendants, commanding them to grant their certificate to the Bishop on the election of A. B. to the lectureship of the parish of C., in order that the bishop might license him. It appeared that the election to this office was made by ballot, by the parishioners paying scot and lot, and not receiving alms from the parish. No person can lecture in the pulpit of a rectory, unless he can

* There are four sorts of deans and deaneries, of which, and of whom, the law of this realm takes notice. The first is a dean, who hath a chapter, consisting of prebendaries or canons, subordinate to the bishop, as a council assistant to him in matters spiritual relating to religion, and in matters temporal relating to the temporalities of his bishopric. Foreseeing that it was impossible but that sects, schisms, and heresies, should arise in the church, it was a Christian policy thought fit and necessary, that the burden of the whole church, and the government thereof, should not lie upon the person of the bishop only; and, therefore, it was deemed expedient that every bishop within his diocese should be assisted with a council, to consult with him in matters of difficulty concerning religion, and deciding of the controversies thereof, and also for the better ordering and disposing of the things of the church, and to give their assents to such estates as the bishop should make of the temporalities of his bishopric; for it was not convenient that the whole power and charge thereof should remain in any one sole person only. The second is a dean, who hath no chapter, and yet he is representative, and hath cure of souls; he hath a peculiar, and a court, wherein he holdeth ecclesiastical jurisdiction; but he is not subject to the visitation of the bishop or ordinary; such is the dean of Battel in Sussex, which deanery was founded by King William the Conqueror, in memory of his conquests; and the dean there hath cure of souls and hath spiritual jurisdiction within the liberty of Battel. The third dean is ecclesiastical also, but the deanery is not representative, but donative, nor hath any cure of souls; but he is only by covenant or condition; and he also hath a court and a peculiar, in which he holdeth plea and jurisdiction of all such matters and things as are ecclesiastical, and which do arise within his peculiar, which oftentimes extends over many parishes; such a dean, constituted by commission from the metropolitan of the province, is the dean of the Arches and the dean of Bocking, in Essex; and of such deaneries there are many more. The fourth sort of dean is he who is usually called "rural dean," having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanery and precinct, by the direction of the bishop, or of the archdeacon, and is a substitute of the bishop in many cases; Hughes, c. 2. Deans of the old foundation are instituted by election of the chapter upon the King's *conge d'elire*, with the royal assent, and confirmation of the bishop, much in the same way as the bishops themselves do; but (generally) the deans of the new foundation come in by the King's letters patent; upon which they are nominated by their respective bishops, and then installed upon a mandate, pursuant to such institution, and directed to the chapters, see Gibbs, 173; 2 Burn. E. L. 79. 81.

A chapter of a cathedral church consisteth of persons ecclesiastical, canons, and prebendaries, whereof the deanery is chief, all subordinate to the bishop, to whom they are assistants in matters relating to the church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishoprics, as the bishop from time to time should happen to make; see Godol. 58; Burn. E. L. 86.

sents, or
there be an
immemori-
al custom
in support
of it

It also appeared that there was no endowment for the lecturer, but that he received a certain sum from the parish officers, out of the money raised by the poor rates. *Per Cur.* We concur with Lord Mansfield, C. J., in 1 T. R. 331, that no person can use the pulpit without the rector's consent, unless there be an immemorial custom for it; where there is such a custom, it is binding on the rector, as it supposes a consideration to him. In such a case, the right of the lecturer partially supersedes the right of the rector. But in the present case, there is no such custom, and the emoluments are not permanent—they depend on voluntary contributions.—Rule discharged.

(h) *Parish Clerk.*

PITTS v. EVANS. H. T. 1738. K. B. 2 Stra. 1108.

A parish
clerk can
not sue for
fees in the
Spiritual
Court.

In this case, a prohibition was granted to suit in the Spiritual Court, by the clerk of Saint M., for fees, on the ground that they must be due by custom, and therefore the subject of an action of *assumpsit*.

(i) *Reader.**

(j) *Visitor.* See *post*, tit. *Visitor*.

(B) RELATIVE TO APPROPRIATE BENEFICES. See also, *ante*, vol. i. tit. *Advowson*.

BRAZENNOSE COLLEGE, OXFORD, v. THE BISHOP OF SALISBURY. E. T. 1814. C. P. 4 Taunt. 831.

The crea-
tion of a
rectory, by
[524]
directing
that a pre-
bend shall
be given to
the rector,
and on his
vacating,
shall re-
main uni-
ted and an-
nexed to
the rectory
for ever,
does not
make the
rectory an
appropriate
benefice
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H. 8. and
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ther benefice
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of souls.

In the 7th of Queen Anne's reign, an act of parliament created a new parish church and rectory, to be called St. Philip's, and directed that the prebend of Sawley shall be conferred by the Bishop of Lichfield for the time being on such person as shall then be rector of the said church; that the bishop shall collate him to it, in such form and manner as is usual, and under such conditions as the statutes of the cathedral church require, to have and to hold the same so long as he shall continue rector of the said new church and no longer; and if by his decease, or any other means, the said church shall become void, the said prebend shall remain united annexed to the said rectory for ever. The act then goes on to say that the succeeding rector shall be collated to the prebend according to the rules of the cathedral church. Next, in the 37th of Geo. 3, an act is passed, not to explain the act 7th of Ann. and it does not refer to that; but the act 4 & 5 Ann. In that act are five clauses; one of them enacts, that the third residentiaryship shall consist of, besides the sixth part of the dividend of the residentiaries, the house in the close of the cathedral church, then enjoyed by Dr. Madan, and the prebend of Sawley, with the treasurer'ship of the said church thereto then annexed, with the appurtenances, which shall be and are thereby inseparably annexed to the third residentiaryship. Next comes the clause respecting the fabric fund, which enacts that the third canon residentiary who shall, after Dr. Madan, become possessed of the third residentiaryship and prebend of Sawley, and treasurer'ship, shall at all times pay one-fifth part of the rents, receipts, benefit, and advantage arising from the said prebend, except of the ancient reserved rent of 66*l.* 13*s.* 4*d.*, and except of the profits of St. Philip's annexed to the said prebend and treasurer'ship in aid of the fabric fund. It was contended that such an appropriation of the rectory to the prebend had been effected as to make it an appropriate benefice within the statute 21 Hen. 8. c. 13. s. 31. and consequently tenable with another benefice, being cure of souls. It was also argued that from the 37 Geo. 3. it was clear that the prebend was not annexed to the rectory, but that the rectory was appropriated to the residentiaryship, and the clause relative to the fabric fund was adverted to.

Sed per Cur. No words can be plainer than those used in the 7th of Anne to show that the rectory is not annexed to the prebend, but the prebend to the rectory. The act besides says, that the succeeding rector shall be collated to the prebend. What! collated to the prebend, when the prebend is annexed to the living! He is to be collated. This would be unnecessary, if he has a

* A readership is not an ecclesiastical preferment within the meaning of the usual title given by a rector to his curate; see *Martyn v. Hind*, Cowp. 437; abridged *ante*.

right to it by means of his character of rector. As to the argument drawn from the 37 Geo. 3, it is evident that, if it had been intended to enumerate all the matters, of which the third residentiaryship should consist, and to include St. Philip's, one would suppose the act would have expressed it by name; but, in speaking of the component parts of the prebend of Sawley, the act does not mention St. Philip's. Then, as to the clause relative to the fabric fund: a fabric fund is to be created, and a contribution is to be made out of the profits of the prebend, with an exception of a particular thing; and a doubt probably occurred to those who penned the act, whether this might not be thought to extend to the rectory of St. Philip's, for preventing which, the act mentions it. One cannot suppose from this mere recital that it was intended to repeal the statute of 7 Ann.: this act not even alludes to it, it does not look at all to the union of the rectory and prebend, nor at all go to undo that which had been most formally done by that act.

(*B) RELATIVE TO THEIR DUTY TO RESIDE WITHIN THE PARISH, &c., AND OF [525]
THE PENALTY INCURRED BY NON-RESIDENCE.

(a) *To whom applicable, and excuse for non-residence.*

1. CATHCART V. HARDY. E. T. 1814. K. B. 2 M. & S. 534; affirming judgment in C. P. T. T. 1813. 5 Taunt. 2.

In this case, on a question coming before the Court, as to whether a prebend was a benefice within the 48 Geo. 3. c. 84. as to the nonresidence of spiritual persons. Lord Ellenborough, C. J., said, the word prebend was certainly in the act, though it might be hard measure to a party who had no house or residence on his prebend; and Dampier, J., observed, that the truth was, when the statute Hen. 8. passed, prebendaries were habitually resident on their prebends, and had no houses of residence.

2. JENKINSON V. THOMAS. E. T. 1792. K. B. 4 T. R. 665.

The declaration in debt on the 21 H. 8. c. 13. against the defendant, a curate, for non-residence, stated the curacy to have been augmented by Queen Anne's bounty. After verdict for plaintiff, on motion in arrest of judgment, the Court said, the words of the statute of Hen. 8. are "beneficed with any parsonage or vicarage," but this is neither a parsonage or vicarage. For wise purposes, augmented curacies are made perpetual cures and benefices by a subsequent statute 1 Geo. 1, in order that such curacies may be perpetual corporations, but the act does not go on to say that they shall be considered parsonages or vicarages. Consequently, these curates are not within the statute of Hen., but are clearly bound by the canon law.—Judgment arrested.

3. LAW V. IBBETSON. E. T. 1770. K. B. 5 Burr. 2792.

To debt upon the 21 Hen. 8. c. 13. for non-residence, the defendant pleaded the general issue. A verdict was given for the plaintiff, subject to the opinion of the Court upon this case, viz. "The defendant beneficed with the rectory of the parish church of Bushey, to which there is a good parsonage house belonging, during all the time mentioned in the declaration, performed the duty of rector of the said parish, but was personally resident and abiding in and upon a dwelling-house belonging to himself, in Bushey, in the parish of Bushey, and not in and upon the said parsonage house, belonging to the said rectory. The defendant also, during all the time aforesaid, was and still is archdeacon in and throughout the whole archdeaconry of St. Alban's, and the limits thereof, which is an ecclesiastical dignity, with jurisdiction of granting licences for marriages, probate of wills, and letters of administration. He has a seat in the church of St. Alban's; has a deputy register who lives at St. Alban's, and keeps an office there: but the seal of office is kept by the defendant in his own custody; to whom the said deputy register applies for the use of the seal and the dispatch of business. The house in which the defendant was and is resident and abiding is within the limits of the said archdeaconry (as is also his rectory-house), but is not belonging, nor is there any house which does belong, to his archdeaconry, as an archdeaconal house."

Per Cur. The words of the 21 Hen. 8. c. 13. s. 26. are very pointed and very precise; they are, "that as well every spiritual person now being promo-

A prebend is a benefice within the 48 Geo. 3. c. 84. as to non-residence does not apply to curates augmented by Queen Anne's bounty.

The 21 Hen. 8. c. 13. requires the residence to be at, in, and upon, a parsonage or dignity.

[526]

ted to any archdeaconry, deanery, or dignity, in any monastery or cathedral church, or other church, conventual or collegiate, or being beneficed with any parsonage or vicarage, as all and every spiritual person and persons which hereafter shall be promoted to any of the said dignities or benefices with any parsonage or vicarage, from the feast of St. Michael the archangel next coming, shall be personally resident and abiding in, at, and upon, his said dignity, prebend, or benefice, or at one of them at the least. And in case that any such spiritual person, at any time after the said feast, keep not residence at one of his said dignities, prebends, or benefices, as is aforesaid, but absent himself wilfully by the space of one month together, or by the space of two months, to be accounted at several times, in any one year, and make his residence and abiding in any other places by such time, that then he shall forfeit, &c." The determinations upon adjudged cases are, "that if he does not reside upon one or the other, he is within the penalty;" and, "that if there be a house upon the parsonage or dignity, he must reside in that house," it not being sufficient to reside in any other house, though it be within the same parish.

4. *WILKINSON v. ALLOT.* E. T. 1776. K. B. 3 Burr. 2725; S. C. Cowp. 429.

And the want of a parsonage house does not authorise the incumbent's residing out of the parish. The defendant was presented, instituted, and inducted to the rectory of Burnham St. Mary's, otherwise Burnham Westgate and Ulple, in the county of Norfolk, in the year 1766, of the value of above 300*l.* per annum; that he had first a lodging, and afterwards a ready-furnished house in the said parish, until Michaelmas now last past, which he then quitted; that from time immemorial there was not, nor is there, any parsonage-house upon the living; that, under these circumstances, the defendant absented himself from all residence upon the said living, and from every parochial duty, from the 28th of April, 1775, to the 28th of December now last past (being eight months), without any other legal excuse, and did not, during the said eight months, reside in or near the said living. In an action for non-residence, the Court were of opinion that, if there be no parsonage-house, he may reside where he will, provided it be within the parish.

5. *DOE, D. ROGERS, v. MEARS.* T. T. 1773. K. B. Cowp. 129.

So a sequestration upon a benefice with a *feri facias*, is no excuse for the non-residence of the incumbent. In ejectment brought to recover two rectories, upon a case reserved for the opinion of the Court, the facts were as follows: "That upon the 9th of May, 1766, the rector, in pursuance of an agreement and in consideration of 360*l.* demised the rectories in question to the lessor of the plaintiff for ninety-nine years, if the rector should so long live, for the purpose of securing the lessor of the plaintiff an annuity of 60*l.* per annum, with a power of entry, and likewise a power of distress and sequestration, if the annuity were in arrear. That the annuity was in arrear, that the rector absconded in December, 1770, and had not been resident since." No witness was called on the part of the defendant, but it was admitted that he was in possession under a sequestration. A verdict was found for the plaintiff, subject to the opinion of the Court upon the following question: "Whether the deed and the lease under which the plaintiff made his title was void by the statute 13 El. c. 20?" The Court said this is a very clear case. A sequestration under a *feri facias* is no impediment or prevention to the serving a cure; and, therefore, the non-residence is a clear avoidance of the lease.

The incumbent of two livings, one of which has a house of residence upon it, and the other not, may reside on that in which there 6. *WYNN v. SMYTHIES.* E. T. 1815. C. P. 6 Taunt. 198; S. C. 1 Marsh. 547. A clergyman had two livings. He resided within one of the parishes, where there was no house of residence. The question raised was, whether there was a sufficient residence there to except him, without license from the bishop, from penalties for not residing on his other benefice. The Court were of opinion that it was; observing: the defendant has performed all the residence which the nature of the case admits: if there be a house, he must reside in it; if there be none, he must live in the parish. Why is a clergyman who has two livings, to consult the bishop on which of them he shall reside, when the law gives him the option to reside on which of them he will?

7. *WRIGHT V. FLAMANK.* H. T. 1815. C. P. 6 Taunt. 52; S. C. 1 Marsh, 368. is no parson
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The incumbent of two livings, A. and B., obtained a license from his bishop to reside out of the parish of A., there being no parsonage-house therein, on condition of his residing at a short distance, and actually performing the duties. It was contended that this was not such a residence at A. as to excuse him from residing at B., without another license for that purpose. The Court acquiescing in this, said: to decide this question, we must look to the 12th sect. of 43 Geo. 3. c. 84. That section subjects the incumbent to the penalties imposed thereby, if he do not reside on his living, or on some other, of which he may be possessed. Now in the present case the defendant does not reside at A.; *prima facie*, therefore, he is liable to the penalties of the act; and he can only be excused from those penalties, by showing that he is resident on some other living. He contends that, though he be not actually resident at B., yet the bishop having permitted him to reside at A., that permission excuses him not only from a residence at B., but also at every other living of which he may be possessed. That proposition, however, is not true to its full extent. As far as he can be called upon to reside at B. it is sufficient, but no further; and if he were desirous to excuse himself for not residing at another living, he should have resorted to the method prescribed by the act; that is, he should have obtained a license for absence from that living. This he has not done; I am therefore of opinion that he is not excused. But the non
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8. *FLETCHER V. DICKENSON.* T. T. 1772 C. P. 2 Blac. 906.

This was an action on the statute 21 Hen. 8. c. 13. s. 26 for the penalty of 10*l.* a month for non-residence. There were eleven counts for non-residence for eleven single months, and a twelfth for absenting himself two months together. The defendant had pleaded the general issue, *nil debet*, in the vacation; and now moved for a reference to the prothonotary to strike out the supernumerary counts. The question made was, if more than one penalty can be recovered for non-residence in any one year? the statute providing that if the party be absent for one month together, or two months at several times, in any one year, he shall forfeit for each default 10*l.* Whereas in the same statute, sect. 1. 30. and 32. the forfeitures for farming lands, or keeping tan-houses or brew-houses, is so much for every week or month. And if more than one can be recovered, whether the whole may not well be comprised in a single count, as in the precedents cited from Cro. Car. 146; Moor, 540; Rastall Entr. 599; 1 Lutw. 138; Sav. 32. The Court would not determine such a question in this collateral way; but recommended to the parties, and they consented, that the declaration should be reduced to three counts: one for the month of August, 1772; another for the remaining ten months; and the third, for absenting himself two months together. case the in
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9. *CATHCART V. HARDY.* E. T. 1814. K. B. 2 M. & S. 534, affirming judgment in C. P. T. T. 1813. 5 Taunt. 2.

This was a writ of error to reverse a judgment of the Court of Common Pleas. The action had been brought to recover the penalty enforced by the 43 Geo. 3. c. 84. on any spiritual person absenting himself from his benefice for more than eight months in any one year. One of the errors assigned was that it did not appear that the defendant absented himself from his benefice for more than eight months in any one year, computed either as a calendar year, or as a year from the time of his induction. da
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Lord Ellenborough, C. J. said, that he had no doubt that "any one year" in the statute was not to be construed one calendar year, commencing from the 1st of January, nor one year from the day of the defendant's induction, but one year before the commencement of the plaintiff's suit. And Darnier, J. said, that the latter was the most reasonable construction; and in the precedent cited from Lill. Entr. 151. it is alleged, that the defendant absented himself for seven months in a year, computed from the 1st of April, and not from a calendar year from the 1st of January, and the policy of the act seemed to be to prevent

spiritual persons from absenting themselves from their benefices for more than three months within the period of a year.

10. *CATHCART v. HARDY*. E. T. 1814. K. B. 2 M. & S. 534. affirming judgment in C. P. T. T. 1813. 5 Taunt. 2.

And the words "an residence, as enjoined by that act, is a proportion of the annual value, according to the length of absence. A declaration on this statute alleged a non-residence for a period of time made up of portions of two calendar years, (that is, a year reckoned from the 1st of January;) viz nine months from the 10th of October. It was objected, that it was not shown whether the penalty was demanded in respect of the annual value of the one year or the other. The Court held, that "annual value" meant, as in common parlance, taking one year with another; otherwise, a late season and an early one might possibly include two harvests within the space of one year.

(b) *License for non-residence.*

A rectory in one diocese, annexed to a deanery in another, requires a distinct licence for non-residence.

1. *WRIGHT v. LEGGE*. H. T. 1815. C. P. 6 Taunt. 48.

A private act "united" and "annexed" a rectory in the diocese of O. to a deanery in the diocese of S, and dispensed with any presentation to the dean, but left institution and induction still necessary. A licence had been granted for non-residence on the deanery from the bishop of S. The question was, whether a licence from the bishop of O. for non-residence on the rectory was necessary. The Court held, that a distinct licence of non-residence was requisite.

The certificate of a licence of non-residence, obtained pursuant to 54 G. 3. c. 54. but not allowed by the archbishop according to 43 Geo. 3. till afterwards, is, however, valid from the time it was originally granted, the moment it is ratified.

2. *WRIGHT v. LAMB*. H. T. 1814. C. P. 5 Taunt. 806; S. C. 1 Marsh. 372.

Action for non-residence. It appeared that a licence for non-residence had been obtained previously to the 11th of July, 1814, pursuant to the 54 Geo. 3. c. 54. but that the allowance by the archbishop required by the 43 Geo. 3. c. 54. had not been obtained till after that period. The question was, whether the licence, when ratified, was valid from the time it was originally granted. The object of the act was to relieve clergymen who were entitled to those excuses which the legislature had given for non-residence, and who might have procured dispensations for non-residence, but had not procured them; and it was intended to relieve them by permitting them now to obtain a licence from the bishop, if he would annex thereto a certificate, that if they had sooner applied the licence would have been granted. It is said here, that though the licence was obtained, and registered within the 14 days next after the granting thereof, yet it was that sort which was not valid, without an additional allowance by the archbishop to give it validity; and it is objected, that such allowance was not obtained before the 1st of July, 1814. To decide the question, we must consider the construction of the act; and if that only requires the licence to be obtained within the limited time, and to be afterwards confirmed by the archbishop, the licence in the present case is sufficient. The 54 Geo. 3. c. 54. speaks only for the licence or certificate, and of the time within which they are to be obtained: it limits no time to any further proceedings. If, then, the licence have been obtained in time, though the allowance by the archbishop were not procured till a later period, that is sufficient.

3. *WYNNE v. MOORE*. M. T. 1814. C. P. 5 Taunt. 757.

The Court in this case held, that a licence of non-residence on a benefice within an archbishop's peculiar, locally situate in another diocese, needs not to be registered in the registry of the diocese, but ought to be registered in the registry of the archbishop.

(c) *Certificate for non-residence.*

WYNNE v. KAY. M. T. 1814. C. P. 5 Taunt. 843; S. C. 1 Marsh. 387.

This was an action for non-residence. A rule nisi had been obtained to discontinue the action, on payment of costs by the defendant up to the time of the application. One of the questions which the case gave rise to was, whether it was necessary that, under the statute 54 Geo. 3. c. 54, the retrospective certificate of a bishop to excuse a non-residence incurred before the passing of that act should be obtained before the 1st of July, 1814. The licence,

(530) Where a benefice within an archbishop's peculiar is locally situate in another diocese, a licence for non-residence need only be registered in

it appeared, had been got previously to that period. In argument, it was contended that it was requisite, and recourse was had to the circumstance of the certificate being granted by the same person as the licence.

Secd per Cur. The act speaks not only of licences granted before the 1st of July, but of those which were granted before the act: "all licences which shall have been granted, or which shall be granted, on or before the 1st of July, 1814, on which the bishop shall certify;" not on which he shall have certified before the 1st of July. It is evident, therefore, that licenses granted before the first of July, 1814, are put on the same footing as those which were granted before the act passed; and that there is no restriction as to the certificates.

the registry of the arch bishop.
The certificate of a bishop under the 54 Geo. 3. to excuse a non-residence, need not be obtained before the 1st of July, 1814.

(d) *Action for.*

1st. *Before what tribunal suable.*

LEIGH V. KENT. T. T. 1789. K. B. 3 T. R. 862.

The plaintiff having recovered nine penalties in action on the 21 Hen. 8. it was moved to stay the proceedings, with liberty afterwards to move in arrest of judgment. On showing cause, it was contended, that the action was not brought according to 21 Jac. 1. c. 4; and the case of *White, q. l. v. Boot*, was cited and relied on.

The action on 21 Hen. 8. as to non-residence can not be sued before justices of assize, or justices of Nisi Prius or gaol delivery, justices of oyer and terminer, or justices of the peace in their sessions, shall be commenced, &c. in the county where committed." Now, this action could not have been brought before the justices of assize or justices of Nisi Prius, &c.; and by the very words of the statute, it only applies to cases where the legislature had given liberty to common informers to bring actions, &c. before justices of assize, &c.; therefore the case of *White v. Boot* (2 T. R. 274.) cannot be law.

Per Cur. The statute of 21 Jac. 1. does not control any of those statutes on which penal actions are to be brought in the superior courts; for the first section enacts, "that all offences to be committed against any penal statute, for which any common informer may lawfully ground any popular action, &c. before justices of assize, justices of Nisi Prius or gaol delivery, justices of oyer and terminer, or justices of the peace in their sessions, shall be commenced, &c. in the county where committed." Now, this action could not have been brought before the justices of assize or justices of Nisi Prius, &c.; and by the very words of the statute, it only applies to cases where the legislature had given liberty to common informers to bring actions, &c. before justices of assize, &c.; therefore the case of *White v. Boot* (2 T. R. 274.) cannot be law. It was an action brought on the statute 25 Edw. 3. and it does not appear that it was considered whether that action could have been brought before justices of assize, &c. and if it could not, then the statute 21 Jac. 1. does not apply to it.

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An averment in a declaration on the 48 Geo. 3. c. 84. that the defendant absented himself for a period exceeding eight months: to wit, on the 10th day of October, 1810, and for the space of nine months thence next following." It was objected, as an error in the judgment of the court below, that here were nine months and a day, out of which the plaintiff might make good the charge of an absence exceeding eight months, and that it was uncertain to what particular portion of that time it related, neither did the finding of the jury ascertain it; and it was accordingly urged, that unless the precise portion of the time were ascertained, it would be impossible for the defendant to plead it in bar to another action. But the Court said, that the averment must be construed to mean a period exceeding eight months, in a consecutive series from the 10th of October; for the time is defined, and made certain by the words "then next following," which were material, and the jury must be presumed to have found that those were the eight months of absence, for which they gave their verdict.

2d. *Declaration.*

CATHCART V. HARDY. E. T. 1814. K. B. 2 M. & S. 534. affirming judgment in C. P. T. T. 1813. 5 Taunt. 2.

This was an action for a penalty under the 48 Geo. 3. c. 84. It was averred, that the defendant wilfully absented himself from his benefice "for a period exceeding eight months: to wit, on the 10th day of October, 1810, and for the space of nine months thence next following." It was objected, as an error in the judgment of the court below, that here were nine months and a day, out of which the plaintiff might make good the charge of an absence exceeding eight months, and that it was uncertain to what particular portion of that time it related, neither did the finding of the jury ascertain it; and it was accordingly urged, that unless the precise portion of the time were ascertained, it would be impossible for the defendant to plead it in bar to another action. But the Court said, that the averment must be construed to mean a period exceeding eight months, in a consecutive series from the 10th of October; for the time is defined, and made certain by the words "then next following," which were material, and the jury must be presumed to have found that those were the eight months of absence, for which they gave their verdict.

3d. *Pleas.*

WYNNE V. KAY. H. T. 1814. C. P. 5 Taunt. 843; S. C. 1 Marsh. 387. In this case the Court decided, that a certificate granted after the 1st of July, 1814, under the 54 Geo. 3. c. 54. could not be pleaded in bar to an action for penalties incurred in consequence of the non-residence of spiritual persons; but could only be taken advantage of by an application being made to the Court to stay the proceedings.

A certificate under the 54 Geo. 3. c. 54. as to non-residence can not be pleaded, being

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4th. Evidence.

1. BEVAN v. WILLIAMS. E. T. 1775. K. B. 3 T. R. 635. n. S. P. SMITH v. TAYLOR. H. T. 1805. C. P. 1 N. R. 210.

In an action for non-residence, the question was, whether the plaintiff, in order to maintain this action, must prove admission, institution, and induction. The plaintiff did prove several acts done by the defendant as parson of the parish; such as receiving the tithes, serving the church, and acting in other respects as parson. *Per Cur.* Nothing can raise any difficulty in this case but a number of precise authorities. All evidence is according to the matter to which it is applied, and the person against whom it is used. Against a third person there might be some reason for the objection; but, as against the man himself, his own letters, receiving tithes, and cutting timber on the glebe, are decisive.

2. STILL v. COLERIDGE. E. T. 1801. Ex. Forrest, 117.

In debt on the stat. 21 Hen. 8. c. 13. s. 26. for non-residence. The declaration stated, that the defendant was vicar of the parish of Salcombe, and that he did not reside, &c. In order to prove the defendant's institution, the principal registrar of the bishop of the diocese was called, who produced the book of entries of the institutions. The title of the entry was, "Salcombe; admission of — Coleridge." It then stated, that on such a day the bishop "instituted the defendant vicar of the vicarage of Salcombe aforesaid." The defendant's non-residence was proved; and evidence was given on his part, that the parish was properly called Salcombe Regis, to distinguish it from another place, called West Salcombe. One of the jury stated, that West Salcombe was a chapelry, and not a parish. The judge directed the jury to find for the plaintiff, being of opinion that the declaration was sufficiently proved.

Per Cur. It must be admitted that the describing of this parish by the name of *Salcombe* which went by the name of *Salcombe Regis* would have been a fatal variance. As to the entry in the bishop's book, that cannot be conclusive against the defendant, for it does not appear that he had any hand in making it; but it is very strong evidence that the parish was called by both names; and if so, the plaintiff has sufficiently proved his case. name of A., is not conclusive evidence against him, though it is evidence of the parish being called by both names.

3. BALLS v. ATTWOOD. H. T. 1791. C. P. 1 H. Bl. 544. S. P. LEIGH v. KENT. T. T. 1789. K. B. 3 T. R. 362.

A declaration had been delivered in this action, which was debt on the statute 21 Hen. 8. c. 13. for non-residence: a rule was obtained to show cause why the proceedings should not be set aside, on the ground, that upon searching in the office no affidavit appeared to be filed that the offence was committed in the county where, and within a year before the action was brought, agreeable to the stat. 21. Jac. 1. c. 4. On showing cause, the above case of Leigh *q. t. v.* Kent was mentioned, to show that the statute of Jac. 1. was not applicable to those statutes on which penal actions are to be brought in the superior courts. The Court were clearly of this opinion, and discharged the rule.

5th. Staying proceedings.

1. WYNNE v. KAY. M. T. 1815. C. P. 5 Taunt. 843; S. C. 1 Marsh. 387.

The Court stayed proceedings in this action, which had been instituted to recover certain penalties for non-residence, though a license for non-residence which it was shown existed, did not cover the whole of the period for which penalties were sought to be recovered, there not being sufficient time left uncovered to subject the incumbent to a penalty.

not enough non-residence to constitute an offence remains uncovered, the Court will stay the proceedings.

2. WRIGHT v. LLOYD. H. T. 1814. C. P. 5 Taunt. 304. S. P. WRIGHT v. WHALLY. Ibid. 306.

A motion was made to stay proceedings, on a writ suggested to be the commencement of an action for non-residence. In this process, the plaintiff was entitled, as suing *qui tam*. The defendant had given him notice of his inten-

tion to move the Court, to stay proceedings, calling it in that notice, an action brought by the plaintiffs against the defendant, to recover penalties for non-residence on his benefice, and the plaintiff had not contradicted that surmise.

Per Cur. This application has been prematurely made. The defendant ought to have stopped, until a declaration had been delivered. As there is, therefore, no evidence that the scope of the action was such as has been alleged, we must refuse the rule.—Rule refused.

3. WYNNE v. BUDD. T. T. 1814. C. P. 5 Taunt. 629.

A rule had been obtained to discontinue this action, which was brought against the defendant for non-residence, upon payment of costs, up to the time of the application. It appeared that the plaintiff had been obliged, in order to learn upon what facts the defendant meant to found his application to the Court to be relieved from the action, to take office copies of the defendant's affidavits. The expense attendant on taking such, it was contended, ought not to be allowed to the plaintiff, as part of his costs.

Sed per Cur. When the legislature, by passing the 54 Geo. 3. c. 84. s. 4. granted this indulgence to the non-resident clergy, who had neglected to take those measures which former acts prescribed, and had thereby incurred penalties, and actions had been commenced against them, they never intended these actions should be put an end to without a perfect indemnity to the plaintiff; nor did they mean that the plaintiff, after they passed this act, should put the defendant to any further expense than was inevitable. We therefore think the motion ought to be granted upon the terms of paying all the costs of the cause up to this time, and also all the costs of the application.

(C) RELATIVE TO THEIR RIGHTS.

[534]

1. BULWER v. BULWER. E. T. 1819. K. B. 2 B. & A. 470.

This was an action of trespass, for breaking, entering, reaping, and carrying away his corn, hay, &c. General issue. It appeared that the defendant had been the rector of C., and that he had resigned the living 2d of May, 1818; plaintiff was presented on the 4th of June, and was instituted to it on the 7th of July, and afterwards inducted. Defendant retained possession of the glebe lands till Old Michaelmas-day following, and severed and took the crops of hay, corn, &c. which had been previously sown. A verdict was found for plaintiff. A motion was made to enter a nonsuit. But the Court said, the general rule of law applicable to cases of this description is, that where a tenant of land has an uncertain interest, which is determined either by the act of God or the act of another, there he has emblements; but that is not so where the tenancy is determined by his own act.—Rule refused.

2. BULWER v. BULWER. E. T. 1819. K. B. 2 B. & A. 470.

Trespass.—Plaintiff was rector of certain glebe lands. He had been presented, instituted, and inducted. Under these circumstances, it was contended that the plaintiff had not sufficient possession of the glebe lands to entitle him to maintain trespass, and for this he cited 2 Roll. Ab. 553. pl. 45.

Sed per Cur. By the act of induction the parson is put into actual possession of a part for the whole, and he can, therefore, maintain trespass. It is not necessary that he should actually go on the glebe itself.

3. BIRCH v. THE BISHOP OF LITCHFIELD. T. T. 1803. K. B. 3 B. & P. 444.

In *quare impedit*, the defendant pleaded that one M. O., under whom he claimed, being seised in fee of one moiety of the advowson, to present to one turn in every two turns, presented one I. O. in her proper turn; that the church being afterwards vacant, one J. W., under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that the church being a fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the Court held that the defendant had not shown a title to present, since he had not shown whether the third presentation was by usurpation or by agreement, and that it could not be pre-

sumed that the defendant was entitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that M. O. had presented to the first turn in her proper turn, and J. W. in his proper turn.

[535]

(*C) RELATIVE TO THEIR PRIVILEGES

(a) *Exemption from offices.**(b) *As to grants by.*

WALL V. NIXON. H. T. 1806. K. B. 3 Smith's Rep. 316.

The grant of a prior incumbent will not bind his successor.

This was an action on the case for an injury done to church lands, by a rivulet being fenced back upon them by a headstock. The existence of the headstock for above twenty years was established at the trial; but the judge held that although in any other case the possession of the headstock for above twenty years would have been evidence of agreement by deed, yet, had the preceding vicar made such a grant, it would not bind his successor. The Court recognised this opinion of the learned judge, but added, that it might be evidence to go to a jury, that there was a headstock anciently. The rule nisi was granted, and upon the argument the same doctrine was acceded to by the Court, and the case was afterwards argued and decided upon the balance of the evidence.

(c) *As to leases by and to.†*

FROGMORTON, D. FLEMING, V. SCOTT. T. T. 1802. K. B. 2 East, 467.

A rector may recover glebe land, &c. held under a demise from him, void by the stat. 13 Eliz. c. 20. from his non-residence.

[536]

This was an action of ejectment, brought by the plaintiff, as rector, against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the statute 13 Eliz. c. 20., which enacts that no lease to be made of any benefice, &c. shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice, without absence, above fourscore days, in any one year, but that every such lease, immediately upon such absence, shall cease and be void. It was contended that, although after the cases of Doe v. Mears, Cowp. 129; and Doe v. Barber, 2 T. R. 749; it could not be maintained that the lease in question might not be avoided on account of the non-residence of the rector; still that it was not competent to the rector himself to set it aside, by showing his own breach of duty. *See per Cur.* It is plain that the legislature meant that the lease should be wholly cut down, and done away by the non-residence of the rector.

(D) RELATIVE TO THEIR LIABILITIES.

1. RADCLIFFE V. D'OYLEY. T. T. 1788. K. B. 2 T. R. 630.

An action for dilapidations will lie by a successor against his predecessor, prebendary, or his executor, in respect of his prebendal house.

An action on the case for dilapidations, disclosed that the defendant held one of the prebends of the cathedral church of Ely, for fifteen years, and was, during that time, seised of the prebendal house thereunto belonging, with the appurtenances. On the 27th of February, 1787, the defendant resigned the said prebend, and was succeeded therein by the plaintiff. At the time of the resignation, the prebendal house, with the appurtenances, was out of tenantable repair; it appeared, King Charles the Second, by letters patent, in 1666, gave to the chapter of Ely a body of statutes, the sixteenth chapter of which provides, that the receiver shall examine the houses of the dean and prebendaries, and see what repairs are wanting; and, if they do not repair when called upon, the receiver is to order the repairs, and to deduct the expense of it out of their stipends; and then the statute provides that the materials shall be found by the church, such as shall be thought necessary in the judgment of the dean;

* Clergymen may, if they please, serve in a temporal office; but they are not bound; see 3 Burn. E. L. 194; hence, they are not liable to serve on juries; see Doug. 190; to appear at the torn or lect, nor to serve in war; see 3 Burn. E. L. 196. So, they may have the benefit of clergy more than once; and are privileged from arrest whilst attending divine service; and their spiritual possessions are exempt from distress; see 3 Burn. E. L. 200.

† Ecclesiastical leases can only be of lands formerly demised; see Doug. 573. A lease by an ecclesiastical person avoided under 13 Eliz. c. 20. by his non-residence for eighty days in one year is void as to all the world; Doe, d. Crisp v. Barber, 2 T. R. 749. abridged ante. But a tenant cannot show that his landlord has no title in an action for use and occupation; a rule which holds where the landlord is a rector simoniacally presented; Cooke v. Loxley, 5 T. R. 4. abridged post, it; Use and Occupation.

it also appeared, the prebendal houses have been usually repaired in the manner pointed out by this chapter, and that no application had been made to the dean, or treasurer, for any materials, or allowance, in respect to the repairs in question, by either the plaintiff, or the defendant; nor have any materials been provided, or allowance made, towards the same. It was insisted, 1st, that this action does not lie against the defendant, as a prebendary of the church of Ely, because no case can be found, in which an action by a prebendary against his predecessor for delapidations has been entertained in a court of law. *Per Cur.* Whether an action on the case will lie against a prebendary for delapidations, there can be no doubt about it; we find, for a century past, that all prebendaries, rectors, vicars, &c. are bound, by law, to keep their houses in repair; and, indeed, it is an obligation on them, both in point of morality and of policy, that their successors should not suffer by the neglect of their predecessors; and, therefore, the late incumbent, or his executors, must make good to the successor any damage which he may thus sustain.—Judgment for plaintiff.

2. *YOUNG v. MURBY.* T. T. 1815. K. B. 4 M. & S. 183.

Declaration in case against defendant, executor of A. B., who was the predecessor of the plaintiff, the present rector, for not repairing of the chancel. Plea; that an action had been previously brought for want of reparation of the rectory house, in which the plaintiff recovered; that the same ruin existed in the chancel at the time of the commencement of the former action, and that the damages now sought to be recovered might have been included in the former action.—Replication; negating the fact that the damages now sought to be recovered were in any manner included in the declaration in the former action.—Demurrer and joinder. *Per Cur.* If the defendant could make out that an injury caused by delapidations was one entire identical injury, forming precisely the same cause of action for every part of it; then he would be right that the plaintiff could have but one action for it. Here there are different and independent injuries in respect of the different parts; the injury from the dilapidation of the house is one thing, that from the dilapidation of the chancel is another; and the causes are distinct; the latter might not be consummated at the time when the first was.—Judgment for the plaintiff.

(E) RELATIVE TO THE LAWS BY WHICH THEY ARE GOVERNED.*

II. COURTS.†

(A) RELATIVE TO THE DIFFERENT KINDS OF.

(a) *Arches:* See *ante*, vol. ii. p. 268.

(b) *Archdeacon.* See *ante*, vol. ii. p. 267.

(c) *Audience.*‡

* The ecclesiastical canons are not all of them according to law, nor any of them obligatory further than as received and allowed time out of mind; *Philips v. Bary*, 2 T. R. 355. abridged post, tit. Visitor.

† The ordinary course of proceeding is, first, by citation, to call the party injuring before them; then by libel, libellus, a little book, or by articles drawn out in a formal allegation, to set forth the complainant's ground of complaint. To this succeeds the defendant's answer, upon oath, when, if he denies or extenuates the charge, they proceed to proofs by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his defensive allegation, to which he is entitled, in his turn, to the plaintiff's answer upon oath, and may from thence proceed to proofs as well as his opponent.

By the statute of 13 Car. 2. c. 12. it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge to tender or administer to any person whatsoever the oath usually called "the oath ex officio," or any other oath, whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge, who takes information by hearing advocates on both sides, and thereupon forms his interlocutory decree, or definitive sentence at his own discretion; from which there generally lies an appeal.

‡ A court belonging to the Archbishop of Canterbury, having the same authority with the Court of Arches, though inferior to it in dignity and authority. Its jurisdiction does not relate to causes between party and party; but to matters pro forma; see 4 Inst. 337; as the

[538]

(d) *Consistory*.* (c) *Convocation*. See *ante*, vol. vi. p. 307.(f) *Delegates*.† (g) *Faculties*.‡ (h) *Prerogative*.§

A sentence in the Consistorial Court for disturbing the plaintiff in the enjoyment of a pew, was reversed by the Archbishops; held that these sentences were not conclusive in an action for a disturbance.

(C) RELATIVE TO PROCEEDING IN, HOW FAR EVIDENCE IN COURTS OF LAW. *CROSS V. SUTTER*. E. T. 1790. K. B. 3 T. R. 639.

In action for the plaintiff's interest, right, and property in a pew, a sentence of the Consistorial Court, adjudging the right to be in the plaintiff, and admonishing the defendant not to sit in the pew, was produced, together with a sentence given upon an appeal from that court to the Archbishops, which reversed the former sentence, and retained the principal cause, and, by interlocutory decree, admonished the defendant and his wife not to sit in the said pew, and condemned them in costs. The counsel for the defendant rested the defence upon the ground that the sentence of reversal in the Court of Archbishops, having a concurrent jurisdiction upon this question with the courts of common law, was conclusive against the claim of right set up by the plaintiff, and on which this action was founded. The judge who tried the cause being of that opinion, non-suited the plaintiff. On motion to set it aside, the Court said, they were of opinion that the proceedings in the ecclesiastical courts were not conclusive evidence, and what weight they would have on another trial was not for their consideration. Rule absolute.

[539]

(D) RELATIVE TO PROVING THE PRACTICE OF THE ECCLESIASTICAL COURTS.||

(E) RELATIVE TO THE LIABILITY OF THE JUDGE OF, FOR AN EXCESS OF JURISDICTION.

BEAUBAIN V. SCOTT. E. T. 1813. K. B. 3 Camp. 388.

An action lies against a judge of an Ecclesiastical Court for an excess of jurisdiction.

In case for unlawfully excommunicating plaintiff, it appeared that the defendant was Vicar General and Official Principal of the Consistorial and Episcopal Court of Beilby; the plaintiff was an attorney practising in that court; that a cause of separation was depending therein, between the plaintiff's son and his wife, to which the plaintiff was no party; yet that the defendant required the plaintiff to take upon himself the burthen of guardian to his said son, and appear in such suit as guardian *ad litem*, which burthen, as the plaintiff lawfully might do, he refused to take on himself. Whereupon, the defendant pretending to be armed with legal authority, unlawfully decreed the plaintiff to be excommunicated for not appearing at a certain day, and taking upon himself the office of guardian assigned to him; that the said sentence of excommunication was pronounced without any citation or legal notice whatsoever. On appeal to Sir John Nicholl, as Dean of the Archbishops, that learned judge held, that plaintiff was bound to become guardian *ad litem*, and that the execution was regular.

At the trial it was contended for the plaintiff, that the action could be sustained: 1st, because the plaintiff was not bound to accept the office of guardian, inasmuch as some other person ought to have been appointed; 2d, that there ought to have been a regular citation and mention before excommunication. It was proved, that in point of fact the plaintiff was acquainted with the order to become guardian *ad litem* as soon as it was pronounced.

consecration and confirmation of bishops elected, admission and institution to benefices and dispensations, &c.; see 4 Inst. 337. 3 Com. Dig. 339.

* Every bishop has his Consistory Court held before his chancellor or his commissary for all his ecclesiastical causes within his diocese; see 4 Inst. 338.

† Is the great court of appeal in all ecclesiastical causes, appointed by the King's commission, under his great seal, and issuing out of Chancery. This commission is frequently filled with lords spiritual and temporal, and always with judges of the courts at common law, and masters of the civil law; see 3 Bla. Com. 66.

‡ The Court of Faculties is an especial court, under the Archbishop of Canterbury, having power by favour and indulgence to grant to a man that which he has no right to by law; as to marry persons without the banns, or to ordain a deacon under age; see 4 Inst. 337.

§ Is the court where the archbishop grants administration, or makes probate of the testaments of all having bona notabilia within his province; see 4 Inst. 335; or repeals probates, or administrations, &c.; *ibid.*; see 3 Com. Dig. 338.

|| The law and practice of the Ecclesiastical Court are matters of fact to be proved by witnesses; see *Beaurain v. Scott*, 3 Camp. 388. abridged *supra*.

Lord Ellenborough, C. J., said, he did not deny that the action could be maintained, if the Ecclesiastical Court had exceeded its jurisdiction. He did not think it unreasonable in directing the plaintiff to sue in the office of guardian, for the defendant was not a party to the appointment, and he had no notice of the appointment. But the judgment was for the plaintiff.

Ejectment, Action of.

I. RELATIVE TO THE DEFINITION AND NATURE OF,
p. 546.

II. REQUISITES GENERALLY ESSENTIAL TO SUPPORT THE ACTION

(A) AS TO THE TITLE.

(a) General requisites of, p. 546. (b) Description of, p. 547.

[540]

1st. By descent, p. 551. 2d. By purchase, p. 551. 3d. By statute, p. 551. 4th. By statute, p. 551.

(B) AS TO THE ENTRY, p. 557.

(C) NOTICE TO QUIT, p. 557.

(D) DEMANDING POSSESSION, p. 557.

III. RELATIVE TO THE PERSONS BY WHOM IT MAY BE MAINTAINED.

(A) ASSIGNEES.

(a) Of bankrupt, p. 563. (b) Insolvent, p. 563. (c) Mortgagee, p. 564. (d) Reversioner, p. 564.

(B) ATTORNEYS, p. 564.

(C) CESTUI QUE TRUST, p. 564.

(D) CHURCHWARDENS, p. 564.

(E) COMMON TENANTS IN, p. 565.

(F) CONUSEE OF STATUTE MERCHANT, OR STAPLE, p. 565.

(G) COPYHOLDER, p. 565.

(H) CORPORATORS, p. 565.

(I) DEVISEES, p. 565.

(J) DISSEISEE, p. 565.

(K) ELEGIT. TENANT BY, p. 565.

(L) EXECUTOR AND ADMINISTRATOR, p. 566.

(M) FREE BENCH AND DOWER. TENANTS IN, p. 566.

(N) GAVELKIND, HEIRS IN, p. 567.

(O) GUARDIANS, p. 567.

(P) INFANT, p. 567.

(Q) JOINT-TENANTS, p. 568.

(R) LEGATEE, p. 568.

(S) LUNATIC, p. 568.

(T) MORTGAGEE, p. 568.

(U) OVERSEERS, p. 570.

(V) PARCENERS, p. 570.

(W) PARTNERS, p. 570.

(X) RECEIVER IN CHANCERY, p. 571.

(Y) RECTOR, VICAR, PARSON, p. 571.

(Z) TENANTS FOR YEARS, LIFE, TAIL, OR IN FEE, p. 571.

(A 1) TRUSTEES, p. 571.

(B 1) VENDEE OF A TERM, p. 573.

IV. RELATIVE TO THE PERSONS AGAINST WHOM IT MAY BE MAINTAINED, p. 573.

V. RELATIVE TO THE THINGS FOR WHICH, AND CIRCUMSTANCES UNDER WHICH, IT MAY BE MAINTAINED.

(A) IN GENERAL.

(a) Where the possession is vacant, p. 574. (b) For non-payment of rent, p. 575. (c) For assigning contrary to agreement, p. 577. (d) Where

there is only an agreement for a lease, or a contract to purchase, p. 577.
(e) Under 1 Geo. 4 c. 87. upon determination of tenancy, p. 578.

(B) IN PARTICULAR.

(a) Adwosons, p. 579. (b) Chamber, p. 579. (c) Church or chapel, p. 579. (d) Close, p. 580. (e) Common, p. 580. (f) Copyhold, p. 580. (g) Cottage, house, and stable, p. 580. (h) Dower, p. 580. (i) Fishery, p. 581. (j) Furze and heath, moor and marsh, p. 581. (k) Glebe, p. 581. (l) Grass, p. 581. (m) Herbage, p. 581. (n) Highway, p. 581. (o) Kitchen, p. 581. (p) Land, p. 582. (q) Lodgings, p. 582. (r) Manor, p. 582. (s) Mills, p. 582. (t) Mines, p. 583. (u) Orchard, p. 583. (v) Pannage, p. 583. (w) Rivulet, p. 583. (x) Rooms, p. 583. (y) Tenement or messuage, p. 584. (z) Tithes, p. 585. (a 1) Underwood, p. 585. (b 1) Vestry, p. 585. (c 1) Watercourse, p. 585.

VII. RELATIVE TO THE DECLARATION.

(A) IN GENERAL.

(a) Whether by bill or original, p. 585. (b) How entitled, p. 585. (c) Venue, p. 586. (d) Parties, p. 587. (e) Day, p. 587. (f) To be written on one side of the paper only, p. 587.

(B) FORMAL PARTS.

[542] (a) Description of the premises, or subject matter of the action, p. 588. (b) Description of the situation, p. 588. (c) Statement of the demise, p. 588. (d) Statement of the entry, p. 591. (e) Statement of the ouster, p. 591. (f) Statement of the notice to appear, p. 592.

(C) AS TO THE SERVICE.

(a) At what time, p. 594. (b) On whom.

1st. In general.

1. Of the general rule, p. 594. 2. Upon the tenant himself, p. 594. 3. Upon the tenant's wife, child, brother, or servant, p. 594. 4. Upon occupiers, as contradistinguished from tenants, p. 597.

2d. In particular.

1. Where there are several tenants, p. 597. 2. Upon one who personates or represents the tenant, p. 598. 3. Where tenant resists the service, or refuses to be seen, p. 599. 4. Upon receiver appointed by Court of Chancery, p. 600. 5. In case of lunacy, p. 600. 6. In case of executors, p. 600. 7. In case of ejectment for a chapel, p. 601. 8. In case of ejectment for a poor-house, p. 601.

(c) Where the possession is vacant, p. 601. (d) Where the possession is partially vacant, p. 602. (e) Off the premises, p. 602. (f) As to being good for part and bad as to residue, p. 602. (g) As to the explanation and acknowledgement thereof, p. 602. (h) Affidavit of.

1st. When to be made, p. 604. 2d. By whom, p. 604. 3d. Before whom, p. 604. 4th. Formal parts in, p. 604. 5th. Must be annexed to the declaration, p. 606. 6th. As to when more than one is necessary, p. 606. 7th. Irregularities, how remedied, p. 606.

[543] (D) AS TO THE AMENDMENT OF, p. 606.

VI. RELATIVE TO THE ANCIENT MODE OF PROCEEDING, AND WHEN IT MUST BE OBSERVED, p. 610.

VII. ——— TO THE APPEARANCE, AND JUDGMENT AGAINST THE CASUAL EJECTOR FOR NON-APPEARANCE.

(A) WHEN THE PARTIES APPEAR.

(a) Who may appear.

1st. In general, p. 612. 2d. In particular.

1. Cestui que trust, p. 612. 2. Devisee, p. 612. 3. Ecclesiastical persons, p. 612. 4. The heir at law, p. 613. 5. Landlord. As to the landlord's right to appear in general, and the tenant's liability for concealing the ejectment, p. 613. 6. Lord by escheat, p. 613. 7. Mortgagee, p. 614. 8. Remainder-man, p. 614. 9. Wife alone, when permitted, p. 614.

(b) Manner of appearance.

1st. Time allowed for, p. 614. 2nd. Of what term to be entered, p. 614.

(B) WHEN THE PARTIES DO NOT APPEAR, AND OF THE JUDGMENT AGAINST CASUAL EJECTOR FOR NON-APPEARANCE, p. 615.

VIII. RELATIVE TO THE LANDLORD'S APPEARANCE, AND THE TENANT'S NOT GIVING THE LANDLORD NOTICE OF EJECTMENT, p. 616.

IX. ——— TO THE CONSENT RULE, p. 619.

X. ——— TO BAIL.

(A) COMMON, p. 620.

(B) SPECIAL, p. 621.

(C) IN ERROR, p. 622.

XI. RELATIVE TO CONSOLIDATING ACTIONS, p. 622.

[544]

XII. ——— TO THE PLEAS.

(A) GENERAL ISSUE, p. 622.

(B) OF SPECIAL PLEAS, p. 622.

(C) SIGNING JUDGMENT FOR WANT OF, p. 623.

XIII. RELATIVE TO THE REPLICATION, p. 623.

XIV. ——— ISSUE, p. 623.

XV. ——— EVIDENCE.

(A) IN GENERAL.

(a) Of defendant's possession, p. 623. (b) Of title, p. 624. (c) Of the entry, p. 625. (d) Of the premises, p. 625. (e) Of ouster, p. 625.

(B) IN PARTICULAR.

(a) Assignee of bankrupt, p. 626. (b) Conusee of statute merchant, p. 626. (c) Conusee of statute staple, p. 626. (d) By copyholder, p. 626.

(e) By devisee, p. 626. (f) By ecclesiastical persons, p. 626. (g) Elegit, tenant by, p. 626. (h) Executor and administrator, p. 627. (i) By guardian, p. 627. (j) By heir, p. 627. (k) By landlord.

1st. On expiration of term, p. 628. 2nd. On determination of yearly tenancy, p. 628. 3rd. For forfeiture, p. 628.

(l) By mortgagee, p. 628. (m) By tenants in common and joint, p. 628.

XVI. RELATIVE TO THE WITNESSES, p. 629.

XVII. ——— TRIAL, p. 630.

XVIII. ——— VERDICT, p. 631.

XIX. ——— JUDGMENT.

(A) MOTION FOR, p. 631.

(B) RULE FOR, p. 632.

(C) HOW ENTERED.

(a) When defendant will not confess lease, entry, &c. p. 634. (b) When sole defendant dies, p. 634. (c) When one of several defendants die, p. 634.

(d) Against feme when baron dies, p. 635. (e) When whole or part of the premises are recovered, p. 635. (f) Within what time, p. 635.

(D) AS TO THE REVIVAL OF, p. 635.

(E) OF SETTING IT ASIDE, p. 636.

(F) WHEN EVIDENCE, p. 636.

XX. RELATIVE TO THE DAMAGES, p. 636.

XXI. ——— COSTS.

(A) SECURITY FOR, p. 636.

(B) PLAINTIFF OR DEFENDANT WHEN ENTITLED TO.

(a) In general, p. 637. (b) Against several defendants, p. 637. (c) As to executors, p. 637. (d) Under 1 Geo. 4. c. 87., p. 638.

(C) REMEDY FOR, p. 638.

XXII. RELATIVE TO THE EXECUTION.

(A) WHEN ESSENTIAL, p. 638.

(B) MOTIONS FOR, p. 638.

(C) HOW TO BE TAKEN OUT.

(a) On judgment for want of appearance, p. 638. (b) When sole or some of defendants die, p. 639. (c) When defendant marries before execution, p. 639.

(D) SHERIFF'S INDEMNITY, p. 639.

(E) HOW, AND AT WHAT TIME TO BE EXECUTED, p. 639.

(F) ATTACHMENT FOR DISTURBING, p. 640.

(G) WHETHER A SECOND EXECUTION IS ALLOWABLE, p. 640.

(H) OF SETTING ASIDE AND STAYING EXECUTION, p. 640.

XXIII. RELATIVE TO THE NEW TRIAL, AND SECOND ACTION FOR THE SAME PREMISES, p. 642.

[546] XXIV. RELATIVE TO THE WRIT OF ERROR, p. 642.

XXV. ————— SETTING ASIDE AND STAYING PROCEEDINGS.

(A) IN GENERAL, p. 614.

(B) IN PARTICULAR.

(a) In the case of mortgages, p. 644. (b) In the case of costs.

1. Until security for be given, p. 646. 2. Until payment of the costs of a former action, p. 646.

I. RELATIVE TO THE DEFINITION AND NATURE OF.*

II. RELATIVE TO THE REQUISITES GENERALLY ESSENTIAL TO SUPPORT THE ACTION.

(A) AS TO THE TITLE.

(a) *General requisites of.*

1. GOODTITLE, D. JONES, v. JONES. M. T. 1776. K. B. 7 T. R. 47.

The title ought to be legal and not equitable.†

Per Lawrence, J. It was once doubted whether or not a person could recover in ejectment on a clear equitable title? But it has been held by a majority of the judges of this Court, that a plaintiff, in ejectment, could only recover on a legal title.

2. DOE, D. HODSDEN, v. STAPLE. M. T. 1788. K. B. 2 T. R. 684. *Contra.*

DOE, D. BRUTON, v. PEGGE. E. T. 1785. K. B. 1 T. R. 758. note. S.

P. GOODTITLE, D. JONES, v. JONES. M. T. 1796. K. B. 7. T. R. 43.

Therefore, where it appears that a term is outstanding in another, the party claim the premises subject to the charge for which the term was created, he can not recover.

[517] The lessor of the plaintiff claimed title as heir at law to lands on which a term that had been created for securing some annuities was still outstanding; laid his demise at a time when that term remained unsatisfied. It was agitated whether the plaintiff had a right to recover upon that demise?

The Court (Buller, J., dissent.) declared that they approved of what was said by Lord Mansfield, in the case of *Lade v. Holford*; Bull. N. P. 110. that he would not suffer a plaintiff in ejectment to be nonsuited by a term outstanding in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender; however, the facts of this case preclude any such presumption; here was an existing term at the time of the demise, the annuitant did not die till after the time of the demise, therefore there was no reason to presume that the trustees had surrendered, and they would have been personally liable if they had. Supposing that the owner of the estate raised a term for ninety-nine years, and for particular purposes gave the possession of the estate to trustees, then if the trustees are in possession, no person can turn them out of possession till the purposes of the trust are answered. To determine, therefore, that if in possession they should not retain it, or should not recover it out of possession, would be counteracting the will of the person who created the term. The law certainly is, that where there is an outstanding term assigned as a security, the plaintiff, though he undertakes not to disturb the incumbrances, cannot recover.

3. KEECH v. HALL. M. T. 1778. K. B. 1 Doug. 21.

Ejectment by a mortgagee against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mortgagor, who had con-

* An ejectment is a possessory action, adopted since the discontinuance of real actions as a general remedy for the recovery of lands or tenements in which the party seeking to recover has the legal interest and right of entry; see *Petersdorff*, Sup. Blac. 145.

† Hence, an award, under a submission to arbitration, will give a good title; sufficient to maintain ejectment, *Doe, d. Morris, v. Rosser*, 3 East, 15; abridged ante, vol. ii. p. 204.

tinued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff was willing to suffer the defendant to redeem. There was no notice to quit; so that, though the written lease should be bad, if the lessee was to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, was, whether, by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or, whether he may not treat the defendant as a trespasser, disseisor, and wrong doer?

Per Cur. The only case at all like the present is *Belchier v. Collins*; but, there, the mortgagee was privy to the lease, and afterwards by a knavish trick, wanted to turn the tenant out. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake. It is emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent, is a purchaser for a valuable consideration; and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong doer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here, the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense; and, therefore, no notice is ever given him to quit.—Judgment for plaintiff.

4. *Doe, D. NEWBY, v. JACKSON.* H. T. 1823. K. B. 1 B. & C. 448; S. C. 2 D. & R. 514.

A. entered into an agreement with B., to sell land then in the possession of the latter, on certain terms, and to execute a conveyance in case A. should be found owner thereof, and could make a good title thereto, and agreed that in the meantime B. should remain in possession. A. afterwards brought ejectment against B. to try the title; but, not having demanded possession, or otherwise determined B.'s tenancy, the Court held that the action was not maintainable.

5. *ROE, D. HALDANE, v. HARVEY.* M. T. 1769. K. B. 4 Burr. 2484.

In ejectment upon a double demise, the plaintiff's own evidence proved that the title was out of one of the lessors, by a deed of conveyance from the lessor in the first demise to the lessor in the second demise. The deed was then in Court, which the plaintiff refusing to produce was nonsuited. On motion to set it aside, the Court (Yates, J., dissent.) held, "that in this action the plaintiff cannot recover, but upon the strength of his own title." He cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a right against every man who cannot show a better title. With regard to the case before us, we don't say that the Court could oblige them to produce this deed; but we think the title of the plaintiff was not complete, the deed not being produced. Parol evidence could not be given by the party who had the deed in his power, and refused to produce it, though it might by the adverse party. It is reasonable that if one party is in possession of a deed, and refuses (after proper notice) to produce it, the other side should be admitted to prove the contents by inferior evidence: but there is no reason why the possessor of the deed should be allowed to give such inferior evidence, when he can give better, if he pleases.—Rule discharged.

6. *DOE, D. LOWDEN, v. WATSON.* M. T. 1817. K. B. 2 Stark. 230.

In ejectment, the plaintiff proved that the defendant was his tenant, and

Though for merly, the Court exercised an equitable jurisdiction, and has suffered the plaintiff to recover under such circumstances.

[548]

An ejectment always treats the tenant in possession as a wrong-doer at the time when the action is brought.

But as possession gives a right against every man who cannot show a better title, the plaintiff must establish his own title, and cannot rely on the weakness of his adversary's.

[549]

Who may show that

the plaintiff had received notice to quit. The defendant gave in evidence a declaration by the lessor of the plaintiff in 1815, that he had sold the lease to one A. B., and that he had assigned it to him, and that he had nothing more to do with the premises.

Lord Ellenborough, C. J., held, that as the plaintiff had transferred his property in the lease, and that the defence was not inconsistent with the admission of the landlord's title by the defendant, during the time for which he paid rent, the plaintiff must be called.

And where a lease made by a rector was rendered void by his non-residence, his lessee was not allowed to recover against a stranger, who, without any title ousted him.

7. *DOE, D. CRISP, v. BARBER.* M. T. 1817. K. B. 2 T. R. 1749.

By 13 Eliz. c. 20. "no lease of any benefice, &c. or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident, without absence above four score days in one year; but that every such lease, immediately upon such absence, shall cease, and be void." At Lady day, 1787, the lessor of the plaintiff received possession of a rectory under a lease, and in August, 1787, he paid rent. On the 17th of March, 1788, the defendant entered without any colour of title, on the ground that the lease was void by non-residence. In ejectment, the Court regretted that such a possession as that of the defendant should find a shield from an act of parliament, that according to the maxim *expressum facit cessare tacitum*, the lessor's title under the lease excluded the suggestion of a subsequent demise. And even that would be equally void, since the act of parliament would affect a parol demise, as well as one by deed; and therefore, although the defendant was a stranger and a wrong doer, the plaintiff could not recover.

So an under lessee in ejectment by his immediate lessor was allowed, to prove that the lease from the original lessor had expired.

8. *ENGLAND, D. SYBURN v. SLADE.* E. T. 1792. K. B. 4 T. R. 582.

A. B. leased land for years, and his lessee, after having been in possession a considerable time made an under lease, the under lessee, upon an ejectment brought by his immediate lessor, contended that he had a right to show that the lease from the original lessor, had expired, and of that opinion were the Court.

9. *DOE, D. BIDDLE, v. ABRAHAMS.* E. T. 1816. K. B. 1 Stark. 305.

The defendant, who claimed to hold lands under A. B., as a security for a debt due to him, defended this action of ejectment by A. B.'s assignees, on the ground that the title of A. B. was derived from a lease from the Crown, for a term of which seventy years were unexpired, and by the 1 Anne, c.

But in a subsequent case, it was held that a party

7. crown leases for more than fifty years, or three lives, are void. *Sed per* Lord Ellenborough, C. J. As the defendant was in possession under the bankrupt act, and *prima facie* derived his title from him. I think the plaintiffs are entitled to a verdict.

who comes into possession under the lessor of the plaintiff, cannot object that the title of the latter is void.

{ 550 }

However, where two tenants in common agreed to make partition, and, after notice the tenant paid the whole rent under a distress to one, it was held that it was

10. *DOE, D. PRITCHETT, v. MITCHELL.* E. T. 1819. C. P. 1 B. & B. 11.

The lessor of the plaintiff and his brother, were tenants in common of the property in question; they agreed that this property should be divided, and that the lands for which the present action was brought should be taken by the lessor of the plaintiff as his share. Subsequently to this agreement, but before the deed of partition was executed, the lessor of the plaintiff distrained on the defendant, who then paid the whole of the rent to the lessor of the plaintiff alone. The lessor of the plaintiff alone gave the defendant due notice to quit, before the deed of partition was executed.

Burrough, J., held, that the payment of the whole rent to the lessor of the plaintiff on the occasion of the distress admitted the plaintiff's title; the plaintiff had a verdict. And on motion to set it aside, the Court concurred with Burrough, J.

an admission of the title of the lessors of the plaintiff and that he could not afterwards dispute it.

11. *DOE, D. PITCHER, v. ANDERSON.* E. T. 1816. K. B. 1 Stark. 262.

In ejectment, a title having been proved in A., who continued in possession from 1809 to 1814, and from whom the lessor of the plaintiff derived his title in 1815, the defendant showed a bare possession by himself during the year

1815. But Lord Ellenborough, C. J., held, that it did not amount to *prima facie* evidence of a seisin in fee in the defendant. 1814, the bare fact of possession by B. in 1815, will not raise the presumption that B. is seised in fee.

12. *DOE, D. BLAND, v. SMITH.* T. T. 1817. K. B. 2 Stark. 199.

And where

In ejectment, the lessor of the plaintiff relied on proof that he had purchased a plaintiff claims as vendee from the sheriff under a *feri facias*, and produced the writ, and proved the sale. For the defendant it was contended that the plaintiff was bound to prove the judgment. But Wood, B., overruled the objection, reserving, however, the point. And, on the case coming before the Court, they directed a nonsuit, der a *feri facias*, the judgment, as well as the writ and sale by the sheriff, must be proved.

13. *ROWE v. POWER.* M. T. 1805. Dom. Proc. 2 N. R. 1.

A declaration in ejectment contained two demises by two different lessors of two distinct undivided thirds. Judgment was given, that plaintiff "do recover his said terms." On error, it appeared from the facts stated, on a bill of exceptions, to the judge's directions on a point of law, that the ejectment respected only one undivided third, which was now made a ground of error.

Sed per Cur. It happens, that an exception very similar was taken on error in a case in the Court of King's Bench (2 Stra. 1180), which Court was of opinion, that the judgment of the Court of King's Bench in Ireland ought to be affirmed. In that case there were two demises alleged for the same term, by two different persons, of the same premises; the judgment was, that the plaintiff should recover his terms. There were two terms for a certain number of years mentioned, one in each of the demises, the terms being the same, to expire the same moment; the objection was made before the Court of King's Bench in England, that it was impossible that the plaintiff could have a right to recover the two terms, according to the words of the declaration; the Court answered it as such an objection deserved to be answered; they said (though what they said was not likely to happen); it might be *in rerum natura* that the estate might have belonged to two joint-tenants, who might have refused to concur in one lease, but each might have made a lease of the whole, which would operate as a lease of the moiety. In this case there is much clearer and stronger ground for affirming this judgment, notwithstanding the objection made to the word "terms." This does not come before us by special verdict but by bill of exceptions.

(b) Destruction of.

1st. By descent.*

2d. By discontinuance. See ante, tit. Discontinuance.

3rd. By statute of limitation.

* By the common law, descents of a corporeal inheritance in fee-simple take away the right of entry; see Lit. s. 385. As, if a disseisor die seised, and the lands descend to his heir, the entry of the disseisee is thereby taken away; unless there has been a continual claim; see Litt. s. 4. And the same rule holds as to abatement, or intrusion, and of the feoffees, or donees of abators or intruders; see 1 Inst. 237. b. But, by 32 Hen. 8. c. 33. "the dying seised of any disseisor of and in any lands, &c. having no title therein, shall not be deemed a descent to take away the entry of the person, or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." The construction put upon this statute is that, if the disseisor die seised within five years after the disseisin, though there be not any continual claim, yet such dying seised shall not take away the entry of the disseisee; but, after the five years, there must be a continual claim, as there was at common law; see 1 Inst. 256. a. Hence, to constitute a descent which shall take away the right of entry from the true owner, there must be a dying seised in demesne of a corporeal inheritance, either in fee, or fee-tail; that the rightful owner be under no legal disability in the time of the ancestor; and also in those cases to which the statute 32 Hen. 8. c. 33. extends, that the disseisor have five years' quiet possession of the lands; see Co. Lit. 239. Plow. 38; 3 Bla. Com. 176. Whether the descent be in the collateral line, or lineal, is immaterial; see 1 Inst. 239. b. But a dying seised for a term of life, or a descent of a reversion or remainder, will not take away an entry; see Lit. s. 327, 388; because, for this purpose it is essentially necessary that the disseisor should die seised both of the fee and freehold; see 1 Inst. 237. b. The descent both of the fee and freehold must be immediate, otherwise the entry will not be barred; see 1 Inst. 241. b.; Litt. s. 394. The doctrine of descent cast tolling the entry, does not affect copyhold or customary estates, where the freehold is in the lord, nor where the party has no remedy but by entry as a devisee; see 7 East, 299; 1 Inst. 240. b.

Twenty
years'

1. By 21 Jac. 1. c. 16. s. 1. it is enacted, that no person shall make an entry into lands, &c. but within twenty years after his right and title shall first accrue." Sec. 2. contains the usual exceptions as to "infants, feme coverts, non compos mentis, or beyond seas," &c.

[553]

Possession, without interruption, is a legal bar,

2. *Stocker v. Berry*. M. T. 1695. K. B. 1 Ld. Raym. 741.

It was ruled by Holt, C. J. If H. has possession of land for twenty years uninterrupted, and then B. gains possession, upon which H. brings ejectment, though H. is plaintiff, yet his possession for twenty years will be a good title for him, as well as if H. had been then in possession; because possession for twenty years now, by virtue of the 21 Jac. 1., is like a descent at common law, which tolls the entry.

3. *Hatcher v. Fineaux*. M. T. 1675. K. B. 1 Ld. Raym. 741.

Provided it be ad-
verse;*

Per Cur. If a man makes a mortgage for collateral security, although the mortgagee is not in possession for twenty years and more; yet, if the interest be paid upon the bond, according to the agreement of the parties, it shall not be barred by the statute of limitations.

4. *Doe, d. Fenwick, v. Reed*. M. T. 1821. K. B. 5 B & A. 232.

But every inference of adverse possession may be rebutted;

Defendant's ancestor came into possession of certain lands in 1752, as a creditor, under a judgment obtained against the then owner of the land; and defendant's family had continued in possession ever since. The Court held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed.

5. *Page v. Selfly*. 1680. Sussex, cited Bull. N. P. 102. b.

Hence, an adverse possession is negatived when the parties

[553]

claim under the same title;

Per Weston, J. If the defendant were to prove that the sister of the plaintiff had enjoyed the estate above 20 years, and that he entered as heir to her, the Court would not regard it, because her possession would be continued to be by curtesy, and not make a disherison but by license, to preserve the possession of the brother, and not to be within the intent of the statute. Though perhaps it would be within the statute, if the brother had ever been in the actual possession, and ousted by his sister; for then her entry could not possibly be construed to be to preserve his possession.

6. *Doe, d. Milner, v. Brightwen*. H. T. 1819. K. B. 10 East, 583.

And when the possession of one party is consistent with the title of the other.

By a marriage settlement, a certain copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement; and after the death of the wife the husband was admitted to the lands pursuant to the equitable title acquired by the settlement, it was held that, if he had had no other title than the admission, a possession by him for twenty years would have barred the heir at law of the wife; but, as it appeared that there was a custom in the manor for the husband to hold the lands for his life, in the nature of a tenant by the curtesy, and this without any admittance after the death of the wife, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband, within twenty years af-

* Where, therefore, the defendant in ejectment has the legal title, he may defend himself although twenty years' possession (not being the possession of the lessor of the plaintiff) should have run against him before he took possession; *Doe, d. Burrough, v. Keade*, 8 East, 38; abridged ante, vol. vi. p. 512. But, if lands are crown lands, and the claimant has been ousted by a wrong doer, after an uninterrupted possession for more than twenty years, a grant of them from the Crown will be presumed in his favour, unless the Crown is incapable of making such grant; but, if such incapacity exists, a grant, of course, cannot be presumed, and no possession less than sixty years will then be sufficient to enable him to maintain an ejectment. And, indeed, as the 7 Geo. 1. c. 16. only bars the suit of the Crown, after a continuing adverse possession for sixty years, but does not also give a title to the adverse possessor, it may be doubted, whether any length of possession of crown lands, not grantable by the Crown, will be a sufficient title to support an ejectment; *Goodtitle, d. Parker, v. Baldwin*, 11 East, 488; abridged post, tit. Grant.

ter the husband's death, though more than twenty years after the death of the wife. And, although one third part of the premises had been settled many years before the marriage, upon a third person for life, and the steward of the manor, appointed by the heir at law and her husband, had constantly deluded himself with the receipt of two-thirds of the rent for the husband on account of his wife; and the remaining one-third for the annuitant; yet, as no surrender had been made to the trustees of the annuitant, it was held that such payment to him must be taken to be with the consent of the person entitled by law to the whole premises, so as to do away the notion of adverse possession by the husband of that third distinct from his possession of the other two-thirds as tenant by the curtesy, after the wife's death.

7. KEENE v. DEARDON. H. T. 1807. K. B. 8 East, 248.

A. B., tenant for life; remainder to his son C. D., in tail; reversion to himself in fee; agreed with C. D., in order to relieve themselves from their debts, to bar the entail; and, in 1773, they conveyed estates, in N. and L., to the use of trustees and their heirs, in trust, to sell the N. estates, and pay the debts, &c.; and as to the L. estate (the only one in question), in trust, that the trustees should, with the consent of A. B. and his wife, and C. D., or the survivor, sell the inheritance in fee, and apply the purchase-money on the trusts after mentioned, with a proviso, that the rents, issues, and profits, should, until sale, of the inheritance, be received by such person, and for such uses as they would have been if the deed had not been made, and no fines levied. And, as to the money arising from the sale of the L. estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee, to be settled subject to certain charges on A. B. for life; remainder to C. D. in fee. A. B. was in possession of the L. estate, and in receipt of the rents, issues, and profits, for above twenty years, without any interference of the trustees. It was objected that such facts showed that A. B.'s possession was adverse to the title of the trustees, so as to bar their ejectment against his grantees; but the point was afterwards abandoned, such possession and receipt being consistent with, and secured to, A. B. by the deed of trust.

So, where the possession and receipt of issues of a trust estate, were for a long time after the creation of the trust, without any interference of the trustees, consistent with, and secured to, the cestui que trust, by the terms of the trust deed, such possession does not bar their ejectment against his grantees brought after the 20 years.*

8. HALL, D. DOE, v. SURTEES. E. T. 1822. K. B. 5 B. & A. 687; S. C. 1 D. & R. 310.

On the 1st of May, 1780, A. mortgaged his premises to B, with a proviso for redemption, on payment of the mortgage-money, on the 3d of November following, but continued in possession until his death; and, after his death, his son and heir and his widow continued in possession until the death of the latter, in 1813. C., his son and heir, conveyed the premises in fee in 1806, who levied a fine, with proclamations, and entered into possession. Ejectment was brought by E., the heir at law of B., the original mortgagee; and, on special verdict found, stating the fact of the non-payment of the mortgage debt without finding either an adverse possession by A. or his heir, or that interest had been paid upon the mortgage money.

And where a mortgagee remained in possession under a deed providing for redemption, if the money were not repaid by a named day and the money not having been paid, an ejectment

The Court held, that the action was maintainable, and said: the statute 21 Jac. 1. does not attach, unless the premises have been wrongfully withheld for more than a period of twenty years. We cannot say, from any thing that appears in this special verdict, that the mortgagor has held wrongfully. It does not follow, because the mortgagee allows the mortgagor to remain in possession, that that is a wrongful possession. For any thing that appears, this may be a possession by permission of the mortgagee; and unless the jury expressly find that the mortgagor has wrongfully held over, against the will and consent of the mortgagee, the statute of limitations does not apply. Though it is not found as a fact in this case, that there was any payment of interest, yet we are to presume that it was paid.

was not brought after the lapse of 37 years, during which time the jury had not found any fact as to the payment of interest, it was held that the action was not barred.

9. HATCHER v. FINEAUX. 1 Ld. Raym. 740.

Per Hok, C. J. If a man makes a mortgage for collateral security, although

So, also the payment of interest on

* For his possession is that of the trustees; see Sudd. V. & P. 241.

a mortgagee the mortgagee is not in possession for twenty years and more, yet if the interest be paid upon the bond, according to the agreement of the parties, it shall not be barred by the statute of limitations.

10. *READING v. RAWSTORNE*. M. T. 1700. K. B. 2 Ld. Raym. 829. S. P. *FORD v. GREY*. Salk. 285.

And an adverse possession is negatived when the party claiming has never in contemplation of law been out of possession.

A. devised lands to B. and his heirs, and died, and B. died; and the heir of B. and a stranger entered, and took the profits for twenty years. Upon ejectment, by the devisee of the heir of B., against the stranger,

The Court held, that this perception of the rents and profits by the stranger was not adverse to the devisee's title; because, when two men are in possession, the law adjudges it to be in him who hath the right. The lessor of the plaintiff and defendant were not tenants in common; for the defendant was a mere stranger; and, though he took a moiety of the profits, that would not make him a tenant in common. But, if they had been tenants in common, it is true that one tenant in common may disseise the other, but that must be an actual disseisin, as the hindering from coming upon the land, and not a bare perception of the profits.

11. *ROE, D. PELLATT, v. FERRARS*. M. T. 1801. C. P. 2 B. & P. 542.

So, an adverse possession is rebutted by showing that possessor has acknowledged a title in the claimant.

A lease for a long term had been granted by the lord of the manor, to the rector, in which the lessee covenanted for himself, his executors, and assigns, to pay, during the continuance of the term, a certain annual rent, and also all the tithe straw of wheat and rye within the parish; and the lessee and his assigns (the succeeding rectors) continued in possession for twenty years and upwards, after the expiration of the term, without payment of rent; but, during that twenty years, suffered the heir of the lessor to take the tithe of the wheat and rye-straw. In ejectment, the Court held, that such sufferance was evidence of an agreement between the lessor and lessee, or their heirs and assigns respectively, that the lessee, or his assigns, should continue his possession, if the lessor and his heirs, were permitted to receive the tithe as before; and that, consequently, there was no adverse holding in the assignee of the lessee.

12. *DOE, D. COLCLOUGH, v. MULLINER*. Sum. Ass. 1795. K. B. 1 Esp. 460. S. P. *DOE, D. CHALLINER, v. DAVIES*. Sum. Ass. 1795. K. B. 5 Esp. 461.

It is doubtful, whether encroachments by the tenant on the waste, after 20 years, belong to the lessee.*

In ejectment, by landlord, after the expiration of the term, against his tenant to recover a garden which the tenant had gained, during his tenancy, by encroachment, Lord Kenyon, C. J., and Thomson, B., laid it down as clear law, that, if a tenant enclose a part of a waste, and is in possession thereof so long as to acquire a possessory right over it, such inclosure does not belong to the landlord, unless he has acknowledged that he held such inclosed part of his lessor, and refused to save the point.

13. *FAIRCLAIM, D. EMPSON, v. SHACKLETON*. E. T. 1769. K. B. 5 Burr. 2604; S. C. 2 Blac. Rep. 690.

To constitute an adverse possession, in some cases, there must be an actual ouster, which may be inferred from circumstances to be considered by the jury.

One tenant in common had received rent for the whole of the premises, and had not accounted for it to his companion, for above twenty years. In ejectment on the question, whether this was such an adverse possession as could bar the tenant in common who had been kept out of the rents from maintaining this action for his undivided moiety.

The Court laid it down, that there must be an adverse possession, in order to enable the statute of limitations to run. There must be a disseisin; and a disseisin strictly proved. But here is no disseisin. If there had been a question about ouster, it might have been a fact to be left to the jury. But we are clear that the defendant never meant to disseise the plaintiff, nor thought of it. The tenant was never desired to attorn for the whole; he only attorned for an undivided moiety, and once paid rent for the same. And the defendant once received rent alone, for the whole, without paying any of it over to the other; but this is no actual ouster; no keeping the plaintiff out of possession; no expulsion.

* Or lessor, held by Heath, J.; Buller, J.; Perryn, B.; 2 Taunt. 160. note.

14. *DOE, D. FISHER, v. PROSSER. M. T. 1773. K. B. Cowp. 217.*

In ejectment, it appeared that there had been for nearly 40 years sole and uninterrupted possession by one tenant in common, without any claim by his companion, to a share of the rents and profits and without any acknowledgement of his right by the other tenant in common. On the question whether this was sufficient for a jury to presume an actual ouster of the co-tenant?

Per Mansfield, C. J. It is a possession of nearly 40 years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account if they think proper, namely, six years; but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents or profits, or of any claim by the lessors of the plaintiff, or of any acknowledgement of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing.

Hence, 36 years sole and uninterrupted possession by one tenant in common, without any account to, or demand, set up by his companion, is evidence of an ouster.*

15. *DOE, D. DUROURE, v. JONES. T. T. 1791. K. B. 4 T. R. 300.*

On a special verdict in this ejectment, it appeared that, in Trinity term, 1775, a *fine sur conuzance de droit come ceo*, &c. was levied of the premises in question, between C. L. plaintiff, and the defendant deforciant; and the last proclamation of that fine was in Easter term, 1776. The lessor of the plaintiff, when the fine was levied and proclaimed, was an infant, but attained the age of twenty-one, on the 26th of Feb. 1784; he was then at large in England, and continued so to be until the 17th of December, 1784, when he was arrested, and imprisoned for debt, and was kept and detained in prison, continually from that time, until the 16th of Sept. 1789; and on the 17th day of that month he, claiming title to the premises in question, made an actual and personal entry thereon in due form of law, to avoid the fine, and ejected the defendant, &c. The question was, whether he were bound by the fine being an infant at the time it was levied, and having been in prison shortly after he came of age, so that five years had not elapsed since he came of age free from the disability of imprisonment.

With regard to the 2^d sec.† of 2 Jac. 1. when the disability is once removed, the statute begins to operate, and will continue to run, notwithstanding any subsequent disability, either voluntary or involuntary.

Per Cur. We never heard it doubted till the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their progress. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. We are clearly of opinion, on the uniform construction of all the statutes of limitations down to the present moment, and on the generally-received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and to make nice distinctions between the cases of voluntary and involuntary disabilities. See *Plowd. 355.*

16. *DOE, D. GEORGE, v. JESSON. H. T. 1805. K. B. 6 East, 80; S. C. 2 Smith's Rep. 236.*

The ancestor died seised, leaving a son and daughter infants. On the death of the ancestor, a stranger entered. The son soon after went to sea, and was supposed to have died abroad within age. The question was, what period the daughter had to bring her action of ejectment.

And where the ancestor died, leaving a son and daughter, infants, and the son, still an infant, went abroad, and there died under age, it was held that the daughter

Per Cur. The stat. 21 Jac. 1. c. 16. s. 2. gives to the party to whom a right of entry accrues, and who is under a disability at the time, 10 years after the disability removed, notwithstanding the 20 years should have elapsed after

* So, where there were two joint-tenants of a lease for years, and one bade the other go out of the house, and he went out accordingly; this was held to be an actual ouster; see 14 Vin. Ab. 512. So, though the entry of one tenant in common is generally deemed the entry of both; yet, if he enter claiming the whole to himself, it will be deemed an actual ouster; see 14 Vin. Abr. 512. But, one tenant in common levying a fine of the whole, and taking the rents and profits afterwards, without account for nearly five years is no evidence from whence the jury should be directed to find an ouster of his companion at the time of the fine levied; and, consequently, the latter may maintain ejectment without making an actual entry; *Peaceable v. Read*, 1 East, 563: abridged post; tit. Fine.

† Ante, 551.

had only ten years after her coming of age to bring an ejectment.

his title first accrued; and to his heir the statute gives 10 years after the death of such party dying under the disability. If it were not so, the time allowed by the statute for making an entry might be indefinitely extended, by parents and children dying under age, or continuing under other disabilities in succession. See 4 T. R. 300; Plowd. 355.

(B) AS TO THE ENTRY.

1. GOODRIGHT v. CATOR. M. T. 1780. K. B. 2 Doug. 477.

An entry is only necessary where [558] it is requisite to rebut the defendant's title.*

Per Lord Mansfield, C. J. I have always taken the distinction to be, that, where entry is necessary to complete the landlord's title, (as when a power to re-enter is reserved to him, in case of non-payment of rent) there the confession of a lease, entry, and ouster, is sufficient; but, that where it is requisite, in order to rebut the defendant's title, actual entry must be made.

2. BERRINGTON v. PARKHURST. H. T. 1737. K. B. 2 Stra. 1086; S. C. Ca. Temp. Hard. 160.

Hence, an actual entry is necessary to avoid a fine levied with proclamations according to 4 Hen. 7. c. 24. and an ejectment cannot be brought until such entry has been made.†

The defendants levied a fine in 1730. To avoid this, the lessor of the plaintiff made an actual entry on the 6th day of January, 1731, and in Hilary term after, brought his ejectment, and laid the demise on the 1st day of October, 1731, which was three months before the actual entry. It was insisted, that an actual entry was not necessary to avoid the fine; because the statute 4 Hen. 7. c. 24. was in the disjunctive, so as the claim is pursued by action or lawful entry, and that therefore the ejectment is sufficient, if the actual entry was out of the case. To which it was replied, 1st, that ejectments were not in use at the time of making the statute, and real actions only were intended; and if ejectments would do, all the questions that have been made about actual entries must have fallen to the ground. At a meeting of all the judges (except Price) it was resolved, that in the case of a fine, there must be an actual entry within five years, and that the confession of an entry to deliver a lease in ejectment shall not operate to avoid a fine.

The King's Bench gave judgment for the defendants; and, on writ of error being brought in parliament, the judges, on the question whether an actual entry was necessary to avoid the fine? answered, that it was not.

3. JENKINS, D. HARRIS, v. PRITCHARD. H. T. 1757. C. P. 2 Wils. 45.

But at common law, an actual entry is not necessary to avoid a fine with out proclamations.

The question was, whether an actual entry is necessary to avoid a fine without proclamations? The Court held, that an actual entry was not necessary to be made, in order to avoid a fine at common law as this is, it being without proclamations.

4. DOE, D. DUCKET, v. WATTS. M. T. 1807. K. B. 9 East, 17. overruling TAPNER, D. PECKHAM, v. MERLOTT. Wils. 177.

Nor a fine with proclamations, if all the pro [559] clamations were not made at the time when the ejectment was brought.

The plaintiff obtained a verdict in an action of ejectment. A motion was now made to set it aside. It appeared that a fine had been levied by the defendant, and that no entry had been made by the plaintiff. It was, however, shown, that all the proclamations had not been made under the statute 4 H. 7. c. 24. at the time when the ejectment was brought. The Court refused the rule.

5. DOE v. PERKINS. M. T. 1814. K. B. 3 M. & S. 271.

So, no entry is necessary to avoid a fine, which has no operation, as a fine levied by son of tenant at sufferance;

Tenant for life, remainder to A. B. in fee, and tenant for life, leases for her life, and dies in 1799; and lessee continues in possession, without paying rent, till his death in 1805, when his son takes possession, and continues without paying rent, and in 1807 levied a fine with proclamations. The Court held that the heir of A. B., the remainder-man, might maintain ejectment against the son, without an actual entry to avoid the fine.

6. PEACEABLE v. READ. T. T. 1801. K. B. 1 East, 576.

Or tenant for years,

Per Lord Kenyon, C. J. Where a tenant for years levies a fine, no entry by the landlord will be necessary, in order to enable him to maintain an ejectment at the end of the term.

* In other cases, the confession of lease, entry, and ouster, is sufficient; see Peters. Sup. Binc. 145.

† And the 4 Ann. c. 16. enacts that "no claim, or entry, shall be of force, to avoid a fine levied with proclamations, or shall be sufficient within the statute of limitations, unless such action be commenced within one year after making such entry or claim."

7. FORD v. GREY. M. T. 1702. K. B. Salk. 285; S. C. 6 Mod. 44.

Per Cur. If there are two joint tenants in fee, and one of them levies a fine of the whole, this amounts to no ouster of his companion, but is a severance of the jointure, though he is in of the old use again; as if a man seised of a manor levies a fine of the demesnes, the manor is gone for ever; and after the fine, though he has the same old estate, yet he has it in another manner; for the fine being *sur consance de droit come ceo* pre-supposes a feoffment; and if one seised as heir to the mother levy a fine *sur grant and render*, the estate shall go to the part of the father, otherwise of other fines.

8. ROE, D. TRUSCOTT, v. ELLIOT. M. T. 1817. K. B. 1 B. & A. 85.

Ejectment. It appeared that one of two tenants in common of a reversion had levied a fine of the whole. The question raised at the trial was, whether an actual entry were necessary to avoid the fine so levied. The judge was of opinion, that it was not requisite. A motion was now made to nullify the verdict, which had been given in accordance with the judge's opinion, on the ground that an actual entry was necessary; that there was an assumption of the whole by the party making the conveyance, and a fine levied accordingly, which it was clear might be levied of a reversion, and these facts amounted to an actual ouster. *Sed per Cur.* We do not see how there could be any assumption of the whole at a time when the party making the conveyance and levying the fine could not by possibility have the possession of any part.

9. DOE, D. SURTAS, v. HALL. E. T. 1822. K. B. 5 B. & A. 687; S. C. 1 D. & C. 340.

In this case the Court held, that the action (of ejectment) was maintainable, although no entry had been made to avoid a fine, which it was concluded was requisite. The facts were, that the action was brought by the mortgagee against his mortgagor. This the judges determined unanimously, as no operation could by law be given to such a fine, it not putting the mortgagee's title at all in jeopardy.

10. GOODRIGHT v. CATOR. M. T. 1780. K. B. 2 Doug. 483.

Per Lord Mansfield, C. J. An actual entry is not necessary where a power to re-enter is reserved, in case of non-payment of rent, there the confession of lease, entry, and ouster is sufficient.

11. DOE, D. COMPERE, v. HUKS. M. T. 1797. K. B. 7 T. R. 433.

In ejectment it appeared that whilst the premises were in the possession of A. B., as tenant for life, under whom the defendant claimed, he levied a fine. It was contended that the lessor of the plaintiff, not having made an actual entry before the 2d of June last, could not recover upon the demise which was laid antecedent to that time; and replied on the case of Clarke v. Pywell, 1 Saund. 319. which shows that an entry was necessary to avoid the fine, with proclamations by tenant for life.

fine with proclamation, though it is not any bar to these in remainder, yet the remainder-man must make an actual entry.†

12. MUSGRAVE v. SHELLEY. C. P. 1748. K. B. 1 Wils. 214.

At a trial at bar in ejectment, the lessor of the plaintiff proved an actual entry into the lands made by him the 27th Sept. 1744, and the demise in the declaration was laid on the 1st Oct. 1744. It was objected for the defendant that he had levied a fine of the lands in Easter Term, 1745; since which time ejectment was brought; and that, to avoid that fine, the entry of the plaintiff's lessor, in Sept. 1744, was not effectual. *Sed per Cur.* The lessor, by his

* And the operation of the statute of limitations; Doug. 477.

† Within five years after the death of the tenant for life; see 2 Ves. 481. And, where there are several remainder-men in succession, the laches of one remainder-man will not prejudice the other; but each remainder-man will be entitled to his right of entry within five years after his title accrues, notwithstanding the laches of those who have preceded him. But this right can only be exercised by the original remainder-men and reversioners, and will not pass by assignment or devise; see 8 East, 552. So, when a lessee for years makes a feoffment, and then levies a fine to his feoffee, an actual entry is necessary, to avoid the fine; see 1 Salk. 339; and the reversioner may then likewise enter within five years next after levying the fine, or within five years next after the expiration of the term; see 2 Lev. 52; 1 Vent. 241; T. Raym. 219.

Or one joint-tenant or partner,

Or by tenants in common.

So, an entry is not necessary to avoid a fine levied by a mortgagor, so as to enable the mortgagee to bring ejectment.

And the same rule holds as to a clause of re-entry for non-payment of rent.*

But where tenant for life levies a

Where one had made an actual entry into the land before any fine was levied, and brought his ejectment after, and laid the demise before the time of levying the

fine, such entry was deemed sufficient*.

entry in 1744, gained to himself a title sufficient to enable him to make the lease in the declaration to have his title tried.

13. FITCHET v. ADAMS. E. T. 1739. K. B. 2 Stra. 1128.

The entry ought to be made by the party [561] claiming; but if it be by a stranger in the name of the person who has the right, who afterwards assents to the entry, it will be sufficient.†

In ejectment, the jury found a special verdict that R. H. (since deceased) being seised in fee of the premises in question, and having a wife M., and a daughter E. of the age of six years, by his will, 16th May, 1722, devised to his wife and her heirs; but if she married again, then he appointed two trustees to receive the rents, and apply them to the education of his daughter till she comes of age, and in case of such marriage of the mother, he devises to the daughter in fee. That Richard died in June 1722, and the wife entered and married a second husband on the 15th day of April, 1723, and the daughter continued to live with and was educated by her, till her, the daughter's death, on the 5th day of May, 1734, when she died without issue, and unmarried; and the lessor of the plaintiff was her cousin and heir. That on the 22d day of May, 1738, J. W., on behalf of the lessor of the plaintiff, did without any previous authority, make an actual entry on the premises, claiming the same as the estate of the lessor, by virtue of his heirship to Elizabeth, and that the lessor having notice thereof, did, on the 5th day of June, 1738, assent thereto. The question was, whether this was a sufficient entry. The Court were very clear that what was found did amount to an actual entry to support an ejectment, being assented to before the day of the demise in the declaration.

14. GREE v. ROLLE. H. T. 1700. K. B. 2 Ld. Raym. 716; S. C. 2 Mod. 651.

So, an entry by a *cestui que trust* will be sufficient.‡

The plaintiff brought an ejectment against the defendant A., for lands in Devonshire, who appeared, and entered into the common rule in ejectment, and pleaded jointly not guilty. The defendant B. appeared, and confessed lease, entry, and ouster; but A. did not appear. On which the plaintiff entered a *non pros* against A.; and, as to B., the jury found a special verdict; on which the question was, whether the entry of *cestui que trust* would be sufficient to avoid the statute of limitations, 21 Jac. 1. c. 16? It was held by the whole Court, that such entry was sufficient to avoid the statute; and they would not hear an argument on the point.

15. ANON. H. T. 1692. K. B. Skin. 412.

The entry must be on the lands comprised in the fine, §

A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question he said to the tenant that he was heir to the house and land, and forbade him to pay more rent to the defendant, but did not enter into the house when he made the demand. It being resolved that the claim at the gate was insufficient, it was proved that there was a court before the house which belonged to it; and that though the claim was at the gate, yet that it was on the land, and not in the street, which the Court deemed sufficient.

16. DOE, D. TARRANT, v. HELLIER. E. T. 1789. K. B. 3 T. R. 170.

[562]
And an entry generally is an entry for the whole, unless otherwise expressed.

Per Lord Mansfield, C. J. A seisure general and undefined must necessarily be a seisure of the whole property; if it were not, what line could be drawn? So, an entry upon an estate generally is an entry for the whole; if it be for less, it should be so defined at the time.

(B) AS TO THE OUSTER. See *ante*, Div. (A) As to the title, Destruction of, by Statute of Limitations.

* The person entitled to the reversion at the time of levying the fine can alone take advantage of the forfeiture; see 12 East, 444.

† And, where an ejectment is brought by a corporation aggregate, they must execute a letter of attorney to some person, empowering him to enter on the land; see 2 Campb. N. P. C. 96.

‡ So, a guardian may enter in the name of his ward. And a reversioner, remainder-man, or lord of a copyhold, may enter in the name of his tenant, see 9 Co. 106.

§ Unless the party be prevented by violence, when the claim must be made as near the land as possible; see Co. Lit. 253. When all the lands lie in one county, the party may enter in any part of them in the name of the whole. But, if in different counties, an entry must be made in each; see Litt. s. 417. The entry must also be made *animo clamandi*, with an intention of claiming the freehold against the fine; see 1 Vent. 42; And. 125; Str. 1086; 13 East, 487.

(C) AS TO THE NOTICE TO QUIT.*

(D) AS TO DEMANDING POSSESSION.

1. *RIGHT, D. LEWIS, V. BEARD.* H. T. 1811. K. B. 10 East, 210.

The Court held, in this case, which was an action of ejectment brought to oust a party, who had been let into possession under a contract of purchase without a previous demand of possession, that such demand was essential, and that it was not dispensed with by defendant's entering into the common rule to confess lease, entry, and ouster.

2. *DOE, D. MARQUIS OF ANGLESEY, V. BROWN.* E. T. 1823. K. B. 2 D. & R. 565.

Landlord entered into an agreement with tenant, on 2d January, 1815, to grant the latter a lease for eight years of certain premises, the agreement to take effect from the 10th of October, 1814, from which time tenant had been in possession, yielding 2s. 6d. yearly: and in case he held over after the term he was to pay 40s. per diem, for every day he retained possession. The lease was never granted. At the expiration of the term, tenant held over; after having been served with a nine months' notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession an ejectment would be brought. It was urged, that there had been no "demand in writing" of the possession, within the meaning of the statute. The written paper which had been served upon the tenant was in substance no more than a notice of action: and, at all events, was not such a formal and absolute demand of possession as the legislature seemed to intend; it ought to have been a demand of possession, and nothing else; but this was mixed up with other matters.

Sed per Cur. There is a demand in writing to deliver up the possession; that is all the statute requires, and the subsequent notice of action cannot invalidate or destroy the effect of the previous demand.

III. RELATIVE TO THE PERSONS BY WHOM IT MAY BE MAINTAINED. §

* That which was formerly considered as a tenancy at will has since been construed to enure as a tenancy from year to year; see 8 T. R. 3, 5 T. R. 471; but, as it originates and continues only to exist by mutual agreement, it may be terminated by either giving a reasonable notice to the other, the length of which must be uniformly governed by the terms of the tenancy; for, if it be from year to year, there must be six months' notice, according to the ancient rule, on either side, except where any special agreement, or the custom of particular places, intervene; see 3 T. R. 17. And, if the rent be reserved quarterly, it will not dispense with the regular six months' notice; as such a condition is considered merely as a collateral matter; see 5 T. R. 471. Since the course which the plaintiff in ejectment is to adopt, with respect to notice, is precisely similar to that which is to be pursued as to all notices to quit, it will suffice to refer to post, tit. Landlord and Tenant; under which head all the cases on the subject will be collected and abridged.

Where the term of a lease is to expire on a precise or certain event, there is no occasion for a notice to quit, because the lease, of course, is at an end, and both parties are apprised of the determination of the demise; unless the lessee continue in possession, the law will, from that circumstance, imply a tacit reservation of the former contract (as far as it is consistent with a tenancy from year to year); in which case, the half-year's notice to quit should correspond, and terminate with reference to the original taking; see 1 T. R. 162; and Petersdorff. Sup. Blac. 147.

† But, where a person enters under an agreement for a lease without a stipulation that, in case a lease is not executed, he shall hold for one year certain, if a lease be tendered to the occupier, which he refuses to execute, he may be ejected, without any demand of possession; see 2 Taunt. 149.

‡ Which requires a demand in writing, "made and signed by the landlord, or his agent, and served personally upon, or left at the dwelling-house or usual place of abode, of such tenant or person" holding or claiming by or under him. And if such tenant or person thereupon refuse to deliver up possession, the landlord may commence his ejectment. As to the object of this statute, see post div. "Relative to the things for which and circumstances under which ejectment may be maintained."

§ This action is brought in the name of a nominal plaintiff, whose supposed title is found-

Where a demand of possession is necessary to maintain ejectment it is not waived by defendant's entering in the common confession rule. A written notice of action is a good demand of possession within the 1 Geo. 4. c. 87. ‡

EJECTMENT.—*By whom maintainable.*

(A) ASSIGNEES.

(a) *Of Bankrupt.* See *ante*, vol. iii. p. 817.(b) *Of Insolvent.*

DOE, D. IBBETSON, v. LAND. H. T. 1823. K. B. 3 D. & R. 509.

An insolvent's assignee,

[564]

plaintiff in ejectment, need not produce the original order for insolvent's discharge, to establish his own title.

Ejectment, by the assignee of an insolvent debtor. To prove his title, plaintiff put in evidence an office copy of the assignment of the insolvent's effects to himself, and a minute of the insolvent's discharge, copied from the entry in the proceedings of the Insolvent Court, and called the clerk of that Court, who stated, that the assignment was never, according to the practice of the Court, made until the proper order for the insolvent's discharge had been allowed. It was objected, for the defendant, that this evidence was insufficient; and that the plaintiff ought to have produced the proceedings of the Court themselves, in order to prove the due discharge of the insolvent, without which the assignment would, by 1 Geo. 4. c. 119. s. 4. be void. The learned Judge overruled the objection, and the Court now confirmed his opinion.

(c) *Of Mortgagee.* See *post*, div. Mortgagee.(d) *Of Reversioner.*

LUCAS v. HOW. H. T. 1677. C. P. T. Raym. 250.

It has been doubted, whether the assignee of the reversion can maintain ejectment, if the lessee break a covenant not to assign without license.

[565]

One tenant in common may maintain ejectment against his co-tenant on an actual ouster.

In ejectment, it appeared that a man made a lease for years, upon condition that the lessee shall not assign over his term to any but his kindred, without licence from the lessor; the lessor assigns over his term and breaks the condition. The question was, whether the grantee of the reversion shall take advantage of this condition? Atkins, J. It is such a condition as is within the 32 Hen. 8. c. 24. But the other judges thought the condition collateral.

(B) ATTORNEYS.†

(C) *CESTUI QUE TRUST.* See *post*, div. Trustees.(D) *CHURCHWARDENS.* See *ante*, vol. v. p. 453.(E) *COMMON, TENANTS IN.*

JOHNSON v. ALLEN. H. T. 1700. K. B. 12 Mod. 657.

Per Cur. Where there are two tenants in common, and one of them does actually oust the other, he may maintain an ejectment against him, and he shall not be admitted to defend, without confessing lease, entry, and ouster; and in that case the plaintiff shall only recover his property in an undivided share, and shall be put in possession of no more; and in such case the sheriff shall give the same execution as he would do of rent on assize, and there can be no mesne profits at all recovered in case of tenants in common; but if one enters only on another, claiming only as tenant in common, and the other brings an ejectment, it will be hard to enforce the defendant, who has done nothing but as tenant in common, to confess lease, entry, and ouster; and here it was ruled, that there should be a confession of lease, entry, and ouster, in case it should appear to be an actual ouster on evidence at the trial, otherwise not.

ded on supposed demises made to him by the party or parties really entitled to the possession of the property; and, by introducing several demises of different persons, all risk of defeat on account of any doubt in whom the legal right is vested may, in general, be avoided; see 1 Chit. Pl. 172.

* By the common law, no one could take advantage of a condition, or covenant, but the immediate grantor, or his heirs. To remedy this inconvenience, it was enacted by the 32 Hen. 8. that the grantees, or assignees of a reversion, shall have the same rights and advantages, with respect to the forfeiture of estates, as the heirs of individuals and the successors of corporations had, until that time, solely enjoyed. The words of the statute granting the privilege of re-entry to the assignees "for non-payment of rent, or for doing waste, or for other forfeiture" have been limited in their interpretation to "other forfeiture of the same nature," and extend to the breach of such conditions only as are incident to the reversion, or for the benefit of the estate; see Co. Lit. 215. And this statute has been holden to extend to the assignee of part of the reversion in all the lands demised; but the assignee of the reversion in part of the lands is not; see Co. Lit. 215. (a). So, the *cestui que use* and bargainee of the reversion are within the statute; see Co. Lit. 215. (a). But persons coming in by act of law are not within its operation; as the lord by escheat; see *ibid*.

† It is ordered that, "for the prevention of maintenance and brocage, no attorney shall be lessee in an ejectment;" Reg. Gen. 1654. K. B. and C. P.

(F) CONUSEE OF STATUTE MERCHANT OR STAPLE.*

(G) COPYHOLDER. See *ante*, vol. vi. p. 517.

(H) CORPORATIONS. See *ante*, vol. vi. p. 635.

(I) DEVISEES. See *ante*, tit. Devise.

(J) DISSEISER. See *ante*, tit. Disseisin.

(K) ELEGIT, TENANT BY.

1. TAYLOR V. COLE. E. T. 1789. K. B. 3 T. R. 295.

Per Lord Kenyon, C. J. If a tenant by *elegit* desire to obtain actual possession of the lands, he must bring an ejectment; for the sheriff, under the writ, delivers only the legal possession. See 2 Eq. Ca. Ab. 380.

2. ROGERS V. PITCHER. E. T. 1815. C. P. 6 Taunt. 207.

Per Gibbs, C. J. I am aware that it has in several places been said that the tenant in *elegit* cannot obtain possession without an ejectment; but I have always been of a different opinion. There is no case in which a party may maintain ejectment in which he cannot enter. The ejectment supposes that he has entered, and that the lessor may, as if by another, and not enter himself, is not very intelligible. I do not, however, mean now to decide that point.

3. DOE, D. DA COSTA, V. WHARTON. M. T. 1798. K. B. 8 T. R. 2.

The plaintiff claimed under an *elegit* against the defendant. In ejectment, the defendant objected that the tenant in possession enjoyed under a lease granted to him by the defendant prior to the date of the *elegit*. To this it was replied, that the plaintiff had given notice that he did not mean to disturb the tenant's possession. But Lawrence, J., said, that the party having the legal title must prevail; and that, as the tenant's title accrued antecedent to that of the plaintiff, the latter must be called. On motion to set this nonsuit aside, the Court refused the rule, concurring with Lawrence, J.

(L) EXECUTOR AND ADMINISTRATOR.

DOE, D. SHORE, V. PORTER. H. T. 1789. K. B. 3 T. R. 13.

The lessor of the plaintiff was administrator of W. S., who died in October, 1786. The demise was laid in the declaration to commence from the 1st of March, 1787, to hold for seven years. It was proved, that W. S. was, in his life-time, an under-tenant to the defendant, who was lessee of a term of the premises in question, and had several times paid the defendant's rent to the landlord. To the evidence which the plaintiff brought in support of his title, there was a demurrer; and after argument upon it, the Court gave their opinion, that the only inference to be drawn from the evidence was, that W. S. had a tenancy from year to year; so long as both of them lived, he could not have been dispossessed without six months' notice, ending at the expiration of the year. This was a chattel interest from year to year, as long as both parties pleased; and it is clear that whatever chattel the intestate had must vest in his administrator, as his legal representative. The interest of the plaintiff could not, in any manner be affected by the length of time stated in the declaration.

(M) FREE-BENCH AND DOWER, TENANTS IN.†

(N) GAVELKIND, HEIRS IN.

DAVENPORT V. TYRRELL. H. T. 1768. K. B. 1 Blac. 675.

Error from the K. B. in Ireland, in an ejectment. The case was this: Maurice Tyrrell died seised of lands which, according to the statute of 2 Anne, in Ireland, being a Papist, descended in gavelkind. At the time of his death

* May support an action of ejectment; see Co. Lit. 42. a.; 2 Salk. 569.

† And personal representatives may recover in ejectment under the 29 Car. 2. c. 3. s. 12. appropriating estates held *pur autre vie* where there is no special occupant. But this statute does not extend to copyholds; and, therefore, one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie* was not permitted to maintain ejectment; see 7 East, 186.

‡ A widow entitled to free bench may, after challenging her right, and praying to be admitted (see Cro. Eliz. 535.), maintain ejectment, without admittance even against the lord; because it is an excrescence which, by the custom and the law, grows out of the estate; see 2 M. & S. 87. But if the widow's claim be in the nature of dower, an ejectment will not lie before assignment, but she must levy a plaint, in the nature of a writ of dower, in the Lords' Court; see Hutt. 18; Hob. 181.

A tenant by *elegit* may maintain ejectment;

Which doctrine seems to have been, at one time, questioned.

And a party, who claims under an *elegit*, subsequent to a lease granted to a tenant in possession, cannot recover.

Ejectment lies by or against an executor or administrator.†

[567]

The possession of one heir in gavelkind is

not the possession of the other, if he enter with an adverse intent to oust the other, and therefore the latter cannot maintain ejectment after sixty years.

he had two sons living, Richard and James; but on his death, in 1704, his son Richard entered alone, and held the same till his death, for 62 years, and in the mean time settled the same, by fine and recovery, and marriage settlement, to which James his brother was privy. On the death of Richard, in 1766, leaving two daughters, James, the lessor of the plaintiff, brought an ejectment against his two nieces for two-thirds of a moiety of the lands, claimed by him as co-heir, in gavelkind to Maurice, and recovered by default, and probably by collusion; and, then, he brought this ejectment against the widow for the other third of the said moiety, which she claimed for her dower, and also under the settlement. For the plaintiff it was contended, that as Richard and James were co-heirs in gavelkind, the possession of the one was also possession of the other; therefore, no argument could be drawn from the long possession of Richard.

Per Cur. The adverse possession of one tenant in gavelkind will not operate as the possession of both. That rule is a qualified rule; and, in the present case, the acts of ownership, fine, &c. make an actual ouster. The statute of limitation operates here as an extinguishment of the remedy of the one, not as giving the estate to the other.

(O) GUARDIANS.*

(P) INFANT.

1. MADDON, D. BAKER, v. WHITE, M. T. 1787. K. B. 2 T. R. 159.

An infant may maintain ejectment.†

[568] A. B. became entitled to the reversion of the premises in question by the death of C. D. In ejectment by A. B., the defendant insisted that he was tenant of the premises under an agreement on the 30th of January last, entered into by A. B., and that no notice to quit had been given. It was insisted that A. B. being under age was not bound by the agreement. But the Court said, the notice to quit ought to have been given; for, even supposing the agreement made by the infant to have been avoided, the parties must stand in the same situation in which they did before that agreement was entered into. At that time the defendant held as tenant from year to year, under a letting from the ancestor, who could not have turned him out without a regular notice; then he was entitled to the same notice, when the premises came to his descendant.

2. BINHAM v. NORIGHT. T. T. 1720. K. B. Ca. Temp. Hard. 56.

Bathe must give security for costs. In ejectment brought by an infant, a motion was made for a rule to compel the lessor of the plaintiff to make a real lessee who might be responsible, or to give security for the payment of the costs. This being determined to be the course of the Court in the case of Throgmorton, on the demise of Miller, v. Smith, Easter, 5 Geo. 2. and before, in the case of Nokes v. Windham, Easter, 12 Geo. 1; 1 Stra. 694; a rule for that purpose was granted.

(Q) JOINT TENANTS.

ROE, D. ROPER, v. LONSDALE. H. T. 1810. K. B. 12 East, 39. S. P. Doe, D. MUNBACK, v. READ. H. T. 1810. K. B. 12 id. 57. S. P. ROE, D.

WAYMAN v. DLOPLIS. T. T. 1810. C. P. 3 Taunt. 119.

One joint-tenant may bring an action of ejectment for his individual share. In this case, it appeared, that copyhold property had descended by custom to all the children equally of the tenant last seised. One of them brought this action (of ejectment) to recover his own share. He was nonsuited for want of a joint demise. A motion had been made to set it aside, and for a new trial. The rule was now made absolute; see 6 East, 173; 11 id. 288.

* Guardians in socage, or testamentary, appointed pursuant to the 12 Car. 2. c. 24. s. 8. may maintain ejectment; see Litt. s. 123; 1 Ld. Raym. 130. But a guardian for nurture cannot maintain ejectment; see Vaugh. 177; 2 Wills. 127.

† It is difficult to discover any principle upon which both infant and Guardian can have power of maintaining ejectment for the same lands, unless indeed, the power of the infant be limited to those cases in which no testamentary guardian has been appointed, and the infant is either above the age of fourteen years, or being under that age; has had no person to take upon himself the office of guardian in socage. No case certainly can be found in which this distinction has been taken; but it is not inconsistent with the doctrine respecting guardians in socage, and accords most fully with the established principles of the action of ejectment; see Adams, Ejectment, 64.

‡ Ejectment against his co-tenant on an actual ouster; see Adams, Ejectment, 81.

(R) LEGATEE.*
(S) LUNATIC.†
(T) MORTGAGEE.

1. THUNDER, D. WEAVER, v. BELCHER. E. T. 1803. K. B. 3 East, 449.

This was an action of ejectment brought by the assignee of a mortgagee against the defendant, who had been let in possession as tenant from year to year, by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. At the trial, *Lawrence, J.*, was of opinion, that the mortgagee was not bound by any act of the mortgagor in letting the estate after the mortgage, and that, as the mortgagor himself might have been ejected without any notice to quit, the tenant who claimed under the mortgage could not have a better right to such notice, and that, therefore, the lessor of the plaintiff was entitled to a verdict. A motion was now made for a new trial, and was refused; see 4 T. R. 680; 1 T. R. 387; 8 T. R. 3.

2. GOODTITLE, D. NORRIS, v. MORGAN. E. T. 1787. K. B. 1 T. R. 755.

An action of ejectment disclosed that R. J. being seised of lands, on the 14th of April granted the same to M. A. for 99 years, subject to a proviso for redemption, on payment of 5000*l.* and interest at a certain day, which sum was not paid on that day. On the 16th of August, 1768, M. A., in consideration of the principal and interest which was due being paid to her, assigned all the premises contained in the deed of 14th April, 1761, for the residue of the said term of 99 years, in trust as to part of the premises (which was a manor) for R. J., and to attend the inheritance, and as to the other part in trust for J. L. By indenture, 13 Dec. 1760, R. J. and R. L. assigned all the premises in question to R. M. for the remainder of the said term of 99 years, in trust for N. S. for securing 10,000*l.*, lent by the latter to R. J. Under this last assignment the lessor of plaintiff claimed, and in whose possession all the title deeds were deposited. There were two defendants, who claimed separately, one under a mortgage of that part of the premises which consisted of the manor made by R. J. on the 3d and 4th of April, 1767, and the other under a mortgage, in fee of the premises, made also by R. J., of the date of the 27th and 28th, 1767, and both which defendants were in possession of the several premises, by ejectment brought on their mortgages. On a case reserved, the Court held, that if a man be so absurd as to make a purchase without looking at the title deeds, he must take the consequence of his own negligence. If he had used ordinary precaution, he must have known that the term was outstanding; and if he did know it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. Besides, it is an established rule, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred. Here, the subsequent mortgagee is a purchaser without notice; and as he has taken the title deeds, he has better title. *Postea* to the plaintiffs.

(U) OVERSEERS.

1. DOE, D. GRUNDY, v. CLARKE. M. T. 1811. K. B. 14 East, 488.

A pauper had been put in possession of a cottage, 40 years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers, till two years ago, when the pauper disposed of it to the defendant. In ejectment, it was holden that the existing overseers could not maintain ejectment for it, having no derivative title as a corporation from their predecessors, so as to connect themselves in interest with the overseers by whom the pauper was put in possession, and the pauper having done no act to recognise his holding under the demising sets of overseers.

* The legatee for a term of years, on the executors assenting, may maintain ejectment; see 4 Esp. 154. S. C. 3 East, 120.

† The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land; see Hutt. 16; Hob. 215; 2 Wils. 130.

‡ So, if the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain ejectment for the mortgaged premises; see 1 Salk. 245.

If after the mortgage the mortgagor lets a person into possession, as tenant from year to year, without the consent of the mortgagee, such mortgagee may eject, because the mortgagor has no power to lease. If there be two several mortgages of the same lands, the mortgagee who has the legal estate will be entitled to recover in an ejectment against the other mortgagee, although his mortgage be posterior in point of time.

[570]

Succeeding overseers cannot support ejectment on the title of their predecessors.

2. *DOE, D. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF ORLETON, v. HARPER.* E. T. 1823. K. B. 2 D. & R. 708.

But a declaration in ejectment by church wardens and overseers, containing two sets of counts, one describing them by their office, without their names; the other by their names, without their office, was holden good after verdict.

Ejectment. The declaration contained four several demises; first, by the churchwardens and overseers of the parish of Orleton; secondly, by the overseers of the said parish; third, by certain persons, (five in number) naming them, but not describing them as parish officers of Orleton; and, fourth, by four of the said persons mentioned in the last demise, naming but not describing them. Plaintiff had a verdict. A motion was now made to set it aside, and the statute 57 Geo. 3. c. 12. s. 17. was referred to, which empowers churchwardens and overseers to take lands and hereditaments in the nature of a body corporate, and declares that in all actions brought in respect thereof it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish, to show that the declaration was insufficient. *Sed per Cur.* By the section of the statute, upon which the objection arises, the churchwardens and overseers are empowered to accept, take, and hold lands, "as a body corporate," and therefore the description, "churchwardens and overseers of the parish," naming the parish, would be correct in point of law, without describing them by their names. Besides this, if any is a mere formal objection, and is cured by the verdict.

(V) PARCENERS.*

(W) PARTNERS.

1. *DOE, D. GREEN, v. BAKER.* E. T. 1813. C. P. 2 Moore, 189; S. C. 8 Taunt. 241.

It is no bar to one of [571] several partners recovering on his own demise, that receipts for rent had been given in the name of the firm.

A., a brewer, demised a public house to B., under an agreement that he should hold for one year certain, and that after the expiration of that time, either party might put an end to the tenancy by giving three months notice to quit; the rent to be payable quarterly. The agreement contained no clause of re-entry. B. took possession, and paid rent to A., who at first gave him a receipt in his own name, and afterwards in the joint names of himself and two partners who were interested with him in the brewery. After he had been in possession three years, A. gave him notice to quit in his own name alone. For the defendant, it was objected that there had been a plain change of landlords, as the agreement was entered into by A. alone, and the receipts for rent were given in the name of the firm, constituting the brewery. That this was a complete transfer of possession, and therefore that the notice to quit should have been given in the joint names of A. and his two partners.

Per Cur. But still there was no conveyance of the premises by A. to his two partners, nor was the legal estate gone from him; and, therefore, the demise by him to the defendant was correct.

(X) RECEIVER IN CHANCERY.†

(Y) RECTOR, VICAR, PARSON.‡ See *post*, div. v. Tithes.

(Z) TENANTS FOR YEARS, LIFE-TAIL, OR IN FEE.§

(A 1) TRUSTEES.

1. *DOE, D. LEICESTER, v. BIGGS.* T. T. 1809. C. P. 2 Taunt. 109.

Per Mansfield, C. J. I thought it had been settled by the case of *Shapland v. Smith*; Bro. C. C. 75; that the distinction between a devise to a per-

* Parceners may maintain ejectment against each other on an actual ouster; see *Adams, Ejectment*, 53.

† It seems that a receiver appointed by the Court of Chancery, with a general authority to let lands, &c. from year to year, has also authority to determine such tenancies; and therefore, may sustain ejectment; see 12 East, 57; Burr. 2694.

‡ A parson cannot maintain ejectment for glebe land after sequestration; see 3 Campb. 447.

§ A tenant for years, life, tail, or in fee, may maintain ejectment; see Doug. 477. It has been said, in 1 Cruise. Dig. 248. that a tenant for years cannot, before entry, maintain an action of trespass, or ejectment, because these acts complain of a violation of the possession; and therefore, cannot be maintained by any person who has not had an actual possession. But this reasoning is not now sustainable; see Doug. 447.

|| May sustain ejectment in all cases in which the trusts are not executed by the statute of uses, because the legal estate vests in him; see *Adams, Eject.* 73.

A trustee under a devise in trust to pay over the rents and profits to another, may maintain ejectment; but he cannot where the words are in trust to

son in trust, to pay over the rents and profits to another, and a devise in trust to permit some other person to receive the rents and profits, was abolished, unless in cases where something special was to be done by the trustee, as to pay rates or repairs; but I find it is otherwise. It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustee, for how can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving. [572]

2. GOODTITLE, D. ESTWICK, v. WAY. E. T. 1787. K. B. 1 T. R. 735.

The lessor of the plaintiff, who was lessee of A. B., by deed wherein the trust of the term was declared to be for the benefit of creditors, brought ejectment against the defendant, who claimed title under an agreement entered into by A. B., and his, the defendant's, father (the date whereof was prior to the deed of trust), whereby A. B. agreed to let for a certain term of years, if he should so long live, to the said defendant's father an estate at a certain rent into which estate the said defendant's father should immediately enter, and it was also agreed that leases with the usual covenants should be made and executed by the parties on a certain day subsequent. The agreement was unstamped. The plaintiff had a verdict, to set aside which a motion was made. But upon argument the rule was discharged, notwithstanding it was insisted that the lessor of the plaintiff stood exactly in the place of A. B., who was a trustee for the defendant, and therefore could not bring an ejectment against his own *cestui que trust*, for the Court said, the only cases where that principle had been adopted were, where the lessor of the plaintiff had been clearly and unequivocally a trustee for the defendant; and it would have been of course for the Court of Chancery to have decreed a conveyance to him; but the Court thought, that in the case in question the demise to the lessor was not a mere voluntary conveyance, but was made to him for the benefit of creditors and was the same as if a mortgage had been made to any individual creditor, and he had brought the ejectment. [573]

It has indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits, and pay them over; will not vest the legal estate in the trustees, unless something is required of the trustees which renders it necessary that they should have an interest in the land, as to pay rates and taxes, &c.; but this doctrine has not yet been sanctioned by any decision of the Courts, though certainly it has happened in all the later cases that the trustees have been required to do other acts, as well as pay rents and profits; see 6 Vin. Ab. 262; 3 B. & P. 175; 3 East. 538. And where it was necessary, for the purpose of the trust, that the trustees should take the legal estate, it was held to vest in them, though the devise be that they suffer and permit the *cestui que trust* to receive the rents and profits; see *Harton v. Harton*, 7 T. R. 652; 12 East, 455. So, where lands were conveyed to trustees and their heirs, in trust that the trustees should, with the consent of A. sell the inheritance in fee and apply the purchase-money to certain trusts, mentioned in the deed, with a proviso, that the rents, issues, and profits, until the sale of the inheritance should be received by such person, and for such uses, as would have been if the deed had not been made, it was held, notwithstanding the proviso, that the estate was vested in the trustees immediately, even before A. had given his consent to the sale; and that it was not a mere power of sale annexed to the legal estate of the owner; see 8 East, 248.

As the statute of uses mentions only such persons as are seised to the use of others, it has been held not to extend to terms of years, or other chattel interests, whereof the termor is not seised but only possessed; and therefore, when only a term of years is created, whatever the nature of the trusts may be, the statute does not execute the uses, but the legal estate always vests in the trustees; see *Poph.* 70; *Dyer*, 367; *Jenk.* 244. And when a term of this kind is created, it does not cease when the trusts are satisfied, unless there is a proviso to that effect in the deed creating the term; see *Sugden's V. P.* 298. So, copyhold estates are not comprehended within the statute of uses; see *Gilb. Ten.* 182. And it seems to have been held, in the case of *Roe, d. Eherall, v. Lowe*, (1 H. Bl. 446.) that a *bona fide* lease made by an equitable tenant in tail will prevent the trustees in whom the legal estate vested from recovering in ejectment against the lessee, although if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. But, from a more recent decision, this principle seems to have been much shaken; see 10 Ves. Jan. 544; and *post*, tit. Trustee, where all the cases on this subject will be collected and abridged.

(B 1) VENUE OF A TERM.

DOE, D. BATTEN, v. MURLESS. H. T. 1817. K. B. 6 M. & S. 110.

In ejectment by the vendee of a term, sold under a *feri facias* against the defendant in execution, it is sufficient to produce the writ, without proving a copy of the judgment.

This was an action of ejectment for a certain term, which had been sold under an execution issued against the defendant. The writ of *feri facias* on a judgment obtained against the defendant was put in; and it was proved that the premises in question were levied under it, and a bill of sale from the sheriff to the lessor of the plaintiff was put in and proved. And, upon exception taken that a copy of the judgment ought to be produced and proved, the case of Doe v. Thorn, 1 M. & S. 425., was cited in answer, and the learned judge overruled the objection, but reserved the point, and there was a verdict for the plaintiff. A rule, which had been obtained to set the verdict aside, was now discharged. The Court observing, a distinction seems to have been taken in former cases, that where the litigating party is not the party against whom the judgment has not passed, it is not necessary, as in the case of a stranger, to show more than the writ. The writ is *prima facie* evidence of a judgment, to which the party litigant being privy might have complained of it to the Court if wrongful; but not having so done, it must be taken as good against him.

IV. RELATIVE TO THE PERSONS AGAINST WHOM IT MAY BE MAINTAINED.

1. DOE, D. CUFF, v. STRADLING. T. T. 1817. 2 Stark. 187.

Ejectment lies against a person unlawfully in possession, though he be the mere servant of another.

The lessor of the plaintiff had let the premises in question for one year to A. B., and the defendant had entered upon them as the servant of A. B., and by his sufferance had held them after the expiration of the term. It was contended that the action ought to have been brought against A. B. But Bayley, J., was of opinion that the defendant was a mere trespasser, and directed a verdict for the plaintiff.

2. DOE, D. JAMES, v. HAMILTON. H. T. 1819. K. B. 1 Chit. Rep. 118.

So, the fact of a party appearing in the view [574] of the real tenant in possession. A nonsuit took place. A rule had been since obtained to set it aside, *Per Cur.* An action of ejectment cannot be brought against a mere servant, when he unquestionably appears to be such; but in this case it appears that, though this person may in fact be a servant, yet that he was the visible tenant in possession, carrying on the business apparently for his own benefit, and assuming, by his language and demeanor, the character of a beneficial occupier.

3. DOE, D. EARL OF THANET, v. GARTHAM. M. T. 1823. C. P. 1 Brigg. 357; S. C. 8 Moore, 368.

But ejectment can not be maintained against a party having a freehold title to premises upon certain conditions, until his interest be determined by some act of the lessor of the plaintiff.

The visitors and seoffees of a grammar-school, who had dismissed the schoolmaster for misconduct, brought this action of ejectment to recover possession of the school-house. They had not determined the master's interest therein, by summoning him to appear before them previously to his dismissal, in order that he might be heard in answer to any charges that might be brought against him, and on which such dismissal, might be founded. The Court were therefore clear, that the defendant having a freehold interest in his office of schoolmaster, the lessors of the plaintiff could not succeed in ejectment till they had determined that interest upon summons in the regular way.

V. RELATIVE TO THE THINGS FOR WHICH, AND CIRCUMSTANCES UNDER WHICH, IT MAY BE MAINTAINED.

(A) IN GENERAL.

(a) Where the possession is vacant.

1. SAVAGE v. DENT. M. T. 1736. K. B. 2 Stra. 1064; S. C. more fully reported 2 Selw. N. P. 713.

To constitute a vacant possession. The lessee of a public-house took another, and removed his goods and family, but left beer in the cellar, and there being rent in arrear, the landlord seal-

ed a lease as on a vacant possession, delivered an ejectment, and signed judgment which was set aside, the Court being of opinion that the tenant, by leaving the beer, still continued in possession; and a case was mentioned, where leaving hay in a barn at Hendon was held to be keeping possession. It further appeared in this case, that the attorney for the plaintiff knew where the lessee removed, and might have served him personally, which is not necessarily to be done on the premises.

2. ANON. H. T. 1817. K. B. 2 Chit. Rep. 188.

Ejectment on a vacant possession. Plaintiff obtained judgment. He neglected to take away the rule for that purpose before the expiration of two days after the term in which the rule was obtained. The Court refused to assist him in the next term; Abbott, J., observing, a party who proceeds on a vacant possession should perform every thing he does in such case more regularly than in a contested possession.

(b) For non-payment of rent.

1. PHILLIPS V. DOELITTLE. H. T. 1721. K. B. 8 Mod. 345.

A lease was made reserving rent; and for non-payment thereof that the lessor might re-enter; the rent was not paid, and thereon the plaintiff brought an ejectment, and had judgment; and now a motion was made to stay proceedings, on payment of what rent was due, and all the costs to this present time; and thereon a rule was made, that the defendant should go before the master, &c. and he to take an account of what rent was due, &c. and that proceedings should stay in the mean time.

Afterwards it was moved to discharge this rule, because it was on an extraordinary motion; for the common motion is to stop proceedings on payment of what is due, now there can be no proceedings after judgment. To which it was answered, that though the plaintiff had judgment, yet this was a proper motion, where such judgment was in ejectment, and this entirely depends on the rules of the court.

Per Cur. The Court usually stays proceedings in ejectment on reasonable terms, at any time before execution executed; but in this case it was ruled that, if the defendant did not bring in to the master, within three days, what rent was justly due and the costs, that then the plaintiff might take out execution.

* And one half year's rent in arrear. 4 Geo. 2. c. 28. (set out, *post*, 575. n.*) If the premises, the possession of which the plaintiff seeks to recover, be empty, the ancient mode of proceeding must be adhered to. Thus, A. (the person claiming title,) by letter of attorney, empowers B. to execute a lease in the name of A. of the premises in question to C. This lease is executed on the premises, B. and C. only being thereon; then B. leaves C. in possession, who is turned out by D. to whom, while on the premises, E. delivers a declaration in ejectment. A rule to plead having been given, and not complied with, a motion is made for judgment, which is granted, of course. This motion must be supported by an affidavit of the above-mentioned proceedings, viz. the execution of the power of attorney, the lease, entry, ouster, and delivery of declaration, a copy whereof is annexed to the affidavit; see Adams, Ejectment, 174; Selw. N. P. 712. In the C. P. this affidavit and motion are unnecessary; and instead of them, a rule to plead must be given on the first day of term, as in other actions; and if there be no appearance and plea at the expiration of the rule, judgment may be signed; see 2 Sell. Prac. 131.

The declaration is the same as usual, only, real persons are made parties instead of fictitious names; see 2 Sell. Prac. 213.

† Which enacts that, "where half a year's rent shall be in arrear, and the lessor, or landlord, has a right to re-enter for non payment, and no sufficient distress is to be found, he may, without any formal demand, or re-entry, serve a declaration in ejectment; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, the same may be affixed in some notorious place of the house or lands; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, if it shall be proved on the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found counter-vailing the arrears then due, and that the lessor had power to re-enter, then, in such case, the lessor shall recover judgment and execution in the same manner as if the rent had been legally demanded, and re-entry made, provided that, if the tenant, at any time before the trial, shall pay or tender to the landlord, or his attorney, or pay into court, the rent arrear and costs; all further proceedings shall be discontinued;" see 1 J. & W. 426; 57 Geo. 2. c. 52; 1 B. & A. 369.

sion, the premises must be totally deserted, and the occupant's residence unknown.*

[575]
The proceedings should be more regular on a vacant than a contested possession.

Before 4 Geo. 2. c. 28. s. 2.† the courts exercised a discretionary power of staying the proceedings at law in cases of forfeiture for non-payment of rent by compelling him to take the money due to him.

2. *ROE, D. WEST, V. DAVIES.* E. T. 1806. K. B. 7 East, 363.

And since that statute [576] the time for the application of the tenant to stay proceedings under 4 G. 2. c. 28. is limited to the period anterior to the trial.

There was an act of ejectment, brought upon the forfeiture of a lease for non-payment of rent. The plaintiff recovered a verdict. A rule was afterwards obtained, calling upon the lessor of the plaintiff to show cause why it should not be referred to the master to compute what was due for rent; and why, upon the payment of the sum so found due, together with the costs of the ejectment and of this application, the proceedings should not be stayed. The application was opposed, on the ground that the stat. 4 G. 2. c. 28. only admits of such an application *before* trial, to avoid the expense and delay of a trial; but not where the landlord has been driven to trial, as in the case before the Court. In support of the rule, it was said, that before that statute the Court exercised a discretionary power in these cases of staying proceedings any time before execution executed, which power the legislature did not mean to take away; but only made it compulsory on the Court to exercise it if the tenant applied before trial.

Per Cur. It may perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for; but it appears, by the words of the act, that the legislature only meant to legalize that practice to a certain extent, namely, upon the application of the tenant before trial. If, therefore, we were now to extend the same relief to him after trial, we would be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn.

3. *GOODRIGHT, D. STEVENSON, V. NORIGHT.* H. T. 1770. K. B. 2 Blac. 746.

And if there has been a legal tender before service of the ejectment, the proceedings will be set aside for irregularity. So the statute applies to a case where the action is brought on a clause of re-entry for non-payment of rent, and also for not repairing. [577] But no proceedings can be had under this statute, if there

In this case the declaration was delivered on the 4th of December, but on the 7th of November preceding, the tenant in possession had tendered his rent, which was refused by the lessor of the plaintiff, because he had put the affair out of his own hands. On the 23d of November it was again tendered, and being again refused, the tenant left the money in his landlord's house, in his presence.

Per Cur. The tender was made before any notice of the action, and therefore the rule to set aside the proceedings must be made absolute, with costs.

4. *PURE, D. WITHERS, V. STURDY.* H. T. 1752. cited Bull. N. P. 97.

In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent and costs. On a rule to show cause, it was insisted for the plaintiff that the case was not within the act; for that it was not an ejectment founded singly on the act, but that it was brought likewise on a clause of re-entry in the lease, for not repairing, and the lease was produced in court; however, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title.

5. *DOE, D. FORSTER, V. WANDLASS.* H. T. 1797. K. B. 7 T. R. 117.

Lessor having a right of re-entry for non-payment of rent, brought an action of ejectment, and proved a demand of half a year's rent after the day on which it was due, and a refusal on the part of the defendant to pay it before the entry. It appearing that there was a sufficient distress on the premises during the whole time. The Court held that the lessor of the plaintiff could not recover either at common law, or under the 4 Geo. 2. c. 28; not by the former, because the rent was not demanded on the day when it became due; Co. Litt. 201; 7 Co. Rep. 28; nor by the latter, because there was a sufficient distress on the premises.

be a sufficient distress on the premises; nor can the common law method be resorted to, if the rent be not demanded the day it became due.

6. *DOE, D. HARRIS, V. MASTERS.* M. T. 1823. K. B. 2 B. & C. 490.

Where the terms of a lease give a right of entry on non-payment of rent, with out formal demand. an

A lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made." The rent was allowed to be in arrear for the time specified. No actual re-entry was made, nor was the payment of the rent demanded; but this action (of ejectment) was commenced. A verdict was found for the plaintiff,

* And if one quarter's rent only be in arrear, the landlord cannot proceed as prescribed by the act; see 2 Stra. 1064.

subject to the opinion of the Court. The *postea* was now ordered to be delivered to the plaintiff.

(c) *For assigning contrary to agreement.*

DOE v. PAYNE. T. T. 1815. K. B. 1 Stark. 86.

A lease contained a covenant "not to assign, set over, or otherwise let the demised premises." In ejectment it was proved that the defendant, a stranger, in possession, stated that they were demised to him by another stranger.

Per Lord Ellenborough, C. J. This does not show that the original lessee either assigned or let, which the plaintiff, to support this action, is bound to substantiate.

premises of another stranger, does not prove a breach of a covenant "not to assign, set over, &c."*

(d) *Where there is only an agreement, for a lease, or a contract to purchase.*

1. DOE, D. OLDERSHAW, v. BREACH. Lent Ass. 1806. 6 Esp. 106.

In ejectment it appeared that no lease had been executed; but an agreement had been entered into between the parties for a lease, which agreement stated the covenants to be inserted in the lease, as to pay rent, and not to underlet, &c., with a right of entry for breach of any of them. This action was founded on the right of entry; and as the plaintiff was preparing to prove the breach, it was objected, that the defendant's estate was an equitable one, only conferred by the agreement, no lease having ever been executed, and that there could be only a forfeiture of a legal estate by reason of a breach of covenant created by some legal instrument.

Macdonald, C. B., said, the case of Doe, d. Bloomfield, v. Smith (6 East, 530.) decided the broad principle, that a tenant in possession by virtue of an agreement for a lease, must be considered as holding from year to year, under the conditions and upon the terms contained in the agreement, and subject to all the legal consequences of holding under such terms; and therefore liable to the present action.

2. RIGHT, D. LEWIS, v. BEARD, H. T. 1811. K. B. 13 East, 211.

It appeared that the defendant was in possession of a certain quantity of land upon an agreement of purchase. No demand of possession had ever been made. Under these circumstances the plaintiff instituted this action of ejectment. A verdict had been found for the plaintiff. A rule had been obtained to set it aside.

Per Cur. The rule must be made absolute. After the lessor had put the defendant into possession, he could not, without a demand of the possession again and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and trespasser as he assumes to do by his declaration in ejectment.

(e) *Under 1 Geo. 4. c. 87. upon determination of tenancy.*

1. DOE, D. PHILLIPS, v. ROE, E. T. 1822. K. B. 5 B. & A. 766; S. C. 1 D. & R. 433.

The question in this case was, whether a demise, in writing, of apartments for a period of *three months* certain came within the meaning of the words 1 Geo. 4. c. 87. which is entitled "An act for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants." The usual rule had been obtained, calling upon the tenant in possession to show cause why he should not undertake, in case a verdict should pass for the plaintiff, to give the plaintiff judgment, to be entered up against the real defendant, of the term next preceding the trial of the cause; and also why he should not enter into recognizance by himself, and two sufficient sureties, in a reasonable

* See *ante*, vol. vii. from p. 160 to 168. where all the cases are collected and abridged.

† Proceedings may be taken, under this statute, in all cases "where the term or interest of any tenant holding a lease or agreement in writing any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant, by regular notice to quit; and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made thereof." The landlord is not bound to proceed under this statute, unless he deems it expedient; see *Arch. Practice*, K. B. 64.

ejectment lies, altho' neither entry nor demand has been made. Proving a stranger to be in possession, and that he took the

Ejectment lies on an agreement for a lease which specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.

But a person possessed of lands under a contract, can not be sued in ejectment, without a determination of such agreement.

A demise for three months certain comes within 1 G. 4. c. 87.† enabling landlords to recover possession of premises

held for a
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number of
years cor
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to year.

[579]

But the
statute does
not apply
to a hold
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year, with
out a lease
or agree
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writing.

Nor to the
case of a
lessee hold
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to quit giv
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self before
the expira
tion of the
term.

Ejectment
lies for a
church.†

[580]

The term
"close is
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al; and e
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does not lie
for a close
containing
20 acres of
arable and
pasture
land, since
the quanti
ty of each
ought to be
stated.

sum, conditioned to pay the costs and damages which should be recovered by the plaintiff. It was supported upon the affidavit required by that statute, stating the regular notice to quit, the refusal to deliver possession upon demand, and the service of the declaration in ejectment.

Per Cur. We are of opinion, that this is a term certain, and therefore comes within the statute, which must mean the term or interest of any tenant holding under a lease, or agreement in writing, any land, &c. for any term whatever. The very object of the statute is to save the landlord the enormous expense of going to trial in an action of ejectment, where the tenant vexatiously holds over after the term of the demise has expired, and after he has received notice to quit.

2. *DOE, D. BRADFORD, v. ROE.* E. T. 1822. K. B. 5 B. & A. 770.

On proceedings under the 1 Geo. 4. c. 87. it appeared upon the affidavit that the tenant held from year to year, and that the tenancy had been determined by a regular notice to quit, but there was no lease or agreement in writing. *Per Bayley, J.* The words are, "where the term or interest of any tenant holding under any lease or agreement in writing, any lands, &c. for any term or number of years, or from year to year, shall have expired, or been determined by a notice to quit;" the words, "under a lease or agreement in writing," apply to the whole sentence, and are not confined to the case of a tenant holding for a number of years certain.

3. *DOE, D. CARDIGAN, v. ROE.* T. T. 1822. K. B. 1 D. & R. 540.

The tenant in possession of certain premises was in this case called upon to show cause why he should not in case of a verdict passing for the plaintiff in ejectment, undertake to follow the directions of the statute 1 Geo. 4. c. 87. It appeared that the tenant held the premises on lease for fourteen years, determinable in the year 1834; the tenant had himself given notice to his landlord of his intention to quit, which was accepted by the landlord; but when the notice had expired, he refused to give up possession. The Court were clearly of opinion that the statute 1 Geo. 4. c. 87. applied only to cases where the lease or term had expired by mere efflux of time.

(B) IN PARTICULAR.

(a) *Advowsons.**

(b) *Chamber.* See *post*, div. (x) Rooms.

(c) *Church or chapel.*

HILLINGWERTH v. BREWSTER. H. T. 1688. C. P. 1 Salk. 256.

Per Cur. Surely a church is a messuage, and may be recovered by that name in a *præcipe*.

(d) *Close.* See also p. 582: (p) Land.

1. *KNIGHT v. SYMES.* E. T. 1688. C. P. 1 Salk. 254; S. C. 4 Mod. Rep. 97.

In ejectment for five closes of arable and pasture, called ———, containing twenty acres in D. on not guilty pleaded, a verdict was given for the plaintiff, but judgment was arrested, because ejectment lies not of twenty acres arable and pasture, without showing how much of the one, and how much of the other; and the adding a name to the close does not obviate the objection.†

2. *CONNOR v. WEST.* M. T. 1770. K. B. 5 Burr. 2672. S. P. *FITZGERALD v. MARSHALL.* H. T. 1670. K. B. 1 Mod. 90.

On a writ of error, the description of the premises demanded being "fifty acres of a furze and heath," and "fifty acres of moor and marsh." The objection was, the not specifying or ascertaining the quantity of each species.

Per Cur. It has been frequently determined, that such exact and precise

* Ejectment will not be for an advowson; see *Peters. Sup. Blac.* 145.

† Or chapel, which should also be demanded as a messuage; see 11 Co. 25; *Styles*, 101; and it is in one case said, in argument, that after collation, ejectment will lie for a prebendal stall; see 1 *Wils.* 11.

‡ And though formerly the addition of the name of the close was deemed insufficient, without specifying the number of acres; see *Owen*, 18; *Cro. Car.* 573; *Cro. Eliz.* 339; 1 *Lev.* 212; yet it seems now such description would be considered good; see *Adams, Ejectment*, 27.

certainly is not requisite in ejectments as in a *præcipe*, A *præcipe*, in a real action, requires exactness and precision; but an ejectment is a fictitious action, contrived for ease, dispatch, and saving expense; and has, of later times, been taken with more latitude than formerly.—Judgment affirmed.

(e) *Common*. See *ante*. vol. v. p. 682.

(f) *Copyhold*. See *ante*, vol. vi. p. 504. 510.

(g) *Cottage, house, and stable*.

DACRE'S CASE. H. T. 1660. K. B. 1 Lev. 58.

In ejectment, after verdict, it was moved in arrest of judgment, that it did not lie for a stable. But the Court held, that it did, as well as for a cottage.

(h) *Dower*. See *ante*, tit. *Dower*.

(i) *Fishery*.

1. WADDY V. NEWTON. T. T. 1723. K. B. 8 Mod. 277.

Per Cur. Ejectment will not lie for a fishery, because it is only a profit appendre.

2. REX V. INHABITANTS OF OLD ALRESFORD. T. T. 1786. K. B. 1 T. R. 358.

Per Ashhurst, J. There 'can be no doubt but that a fishery is a tenement. Trespass will lie for an injury to it, and it may be recovered in ejectment.

(j) *Furze and heath, moor and marsh*. See *ante*, div. Close.

(k) *Glebe*.†

(l) *Grass*. See *post*, div. Land.

(m) *Herbage*.‡

(n) *Highway*.

GOODTITLE, D. CHESTER, V. ALKER. H. T. 1757. K. B. 1 Burr. 133; S. C. Bull. N. P. 133.

In ejectment, the question was, "whether an ejectment will lie by the owner of the soil for land which is subject to a passage over it as the King's highway?" *Per Cur.* It is like the property in a market or fair, and there is no reason why he should not have a right to all remedies for the freehold, subject still indeed to the servitude or easement. A writ of assize would lie if he should be disseised, and an action of trespass might be brought for an injury done to it. The case of the defendant is most unfavourable; for he insists on holding the thing demanded, without any pretence of title, and insists that the plaintiff shall have no specific remedy for his land.—Judgment for the plaintiff.

(o) *Kitchen*.§

(p) *Land*.|| See also, *ante*, p. 580, div. (d).

1. BARNES V. PETERSON. M. T. 1730. K. B. 2 Stra. 1063.

An ejectment was brought for lands in Norfolk, and, among other things, for five acres of Alder Carr, and it was moved to be too uncertain; but on proof that it is a term well known there, and signifies the same as *alienetum* which is mentioned by Lord Coke, and means land covered with alders, the Court held it well enough, alluding to the case of Lord Kildare v. Fisher, where it was held to lie for mountain in Ireland.

2. KILDARE V. FISHER. M. T. 1717. K. B. 1 Stra. 71.

On a writ of error, brought on a judgment in Ireland in ejectment; it was * So, also for a house; though in the *præcipe* they ought to be demanded by the name of messuage; see Cro. Jac. 654; Palm. 387.

† Ejectment does not lie for a glebe after sequestration; see 3 Campb. 447.

‡ Ejectment lies for herbage; but it must be for the herbage itself, and not for the land; see Hard. 330.

§ The term "kitchen" was formerly considered too uncertain, because it was said any chamber in the house might be applied to that use; see Noy, 109. But now it seems a sufficient description; see Adams, Ejectment, 27.

|| An ejectment will lie *pro prima tonsura*, that is to say, if a man has a grant of the first grass which grows on the land every year, he may maintain ejectment against him who withholds it from him; see Cro. Car. 362; Hard. 330. But the ejectment should not be brought for the land generally; it ought to be for the first grass or after mow thereof; see 2 T. R. 451. So, an ejectment lies for "ten acres of peas;" see 1 Brown. 140.

The word "mountain," in Ireland, is a term of quality rather than situation;* So, "beast-gate," in Suffolk, is a good description. Ejectment lies for [583] corn-mills, without stating what kind.

An ejectment *de mineris carbonum* in G., is good.

Ejectment does not lie for pannage.

Ejectment lies for "part of a house," called A.g

objected, that it was brought for one hundred acres of mountain, which is a description of the situation, and not the quality of the land. And 11 Co. 55; 2 Roll. Rep. 166. 189; Palm. 190; Hardr. 58; were cited. But the opinion of the Court was otherwise, and consequently the judgment was affirmed.

3. BENNINGTON V. GOODTITLE. H. T. 1737. K. B. 2 Stra. 1084.

On a writ of error, brought on a judgment in ejectment, it was held, to lie for a beast-gate, which is a term common in Suffolk, and imports land and common for one beast.

(q) *Lodgings*. See *post*, div. *Rooms*.

(r) *Manor*.† (s) *Mills*.

FITZGERALD V. MARSHALL. H. T. 1670. K. B. 1 Mod. 90.

Error on a judgment from the 'King's Bench in Ireland. The error assigned was, that the ejectment was brought *de quatuor molendinis*, without expressing whether they were wind-mills or water mills. *Per Cur*. This is well enough. The precedents in the register are so.

(t) *Mines*.

WHITTINGHAM V. ANDREWS. M. T. 1688. K. B. 4 Mod. 143; S C. 1 Salk. 255.

On a writ of error brought on a judgment in ejectment in the court of Durham, the declaration was of coal mines, in Gateside, without showing the number of mines. It was not questioned but an ejectment lies of a coal mine; 2 Cro. 150. But the uncertainty in not expressing the number was doubted; for the plaintiff it was urged, that the course was so in Durham, and that the declaration was according to the plaintiff's lease; and as this was the constant course in Durham, so it was well enough understood in those parts. And the Court were satisfied such ejectments were usual in Durham, and affirmed the judgment.

(u) *Orchard*.‡ (v) *Pannage*.

PEMBLE V. STERNE. E. T. 1666. K. B. 1 Lev. 212.

Motion in arrest of judgment, because the ejectment was, among other things, *de pannagium*, whereof an ejectment does not lie; for *pannagium* is but a privilege of taking pannage; and of that opinion were the Court.—Judgment arrested.

(w) *Rivulet*. See *post*, div. *Watercourse*.

(x) *Rooms*.

SULLIVAN V. SEAGRAVE. E. T. 1725. K. B. 1 Stra. 695.

On a writ of error brought on a judgment in Ireland, in ejectment, for part of a house, known by the name of the Three Kings, in A—, it was objected, that an ejectment would not lie for part of a house, and that the sheriff could not know of what part he was to deliver the possession; and 2 Roll. Rep. 43; 11 Co. Saville's case, 4 Mod. 166; Mo. 702; Lutw. 974; March. 97; Salk. 254; were cited. But the Court were of opinion it was well enough, the situation of the house being sufficiently described, and the same certainty is never required in an ejectment as in a *præcipe*; therefore the judgment was affirmed.

[584]

(y) *Tenement, or messuage*.

1. GOODTITLE V. WALTON. E. T. 1728. K. B. 2 Stra. 834. S. P. COPLESTON V. PIPER. E. T. 1696. K. B. 1 Ld. Raym. 191.

After verdict in ejectment, the judgment was arrested, because it was for a messuage, a garden, and a tenement; whereas *de uno tenemento* will not lie.

2. HEXHAM V. CONIERS. T. T. 1687. K. B. 3 Mod. 238.

In ejectment, the plaintiff declared *de uno messuageo sive tenemento*; and had a verdict. On motion, the Court arrested the judgment, because an eject-

* But the term "mountains" for land in England is too uncertain; see Hard. 57.

† Formerly, it was considered that ejectment did not lie for a manor, without describing the quantity and species of the land; see Het. 146; Litt. Rep. 299; Latch, 61. But now it seems sufficient to declare for a manor, or a moiety of a manor generally; see Adams, Ejectment, 28.

‡ Ejectment lies for an orchard; see 1 Lev. 58.

§ So, it may be maintained for a room or chamber on a certain story; see 3 Leon. 210.

Ejectment will not lie for a tenement,

Unless it has an addition;

ment will not lie for a tenement, it being a word of an uncertain signification; but it is good if it has an addition, as "The Black Swan." See *Copleston v. Piper*, 1 *Ld. Raym.* 191; *Goodtitle v. Walton*, 2 *Stra.* 834; *Cro. Car.* 555; *March.* 96; *Jones*, 454; *Hard.* 173; *Noy*, 86; 1 *Sid.* 295; 3 *Leon.* 228; 3 *Wils.* 23; *Barnes*, 150; 4 *Mod.* 136; 1 *Burr.* 643; 2 *Bac. Ab.* 169; *Cowp.* 350.

3. *GOODRIGHT, D. WELSH, v. FLOOD.* M. T. 1723. C. P. 3 *Wils.* 23.

In ejectment, the plaintiff declared for one messuage or tenement. On motion in arrest of judgment, the Court reluctantly held, that the judgment must be arrested. Nor for a messuage or tenement,

4. *DOE, D. BRADSHAW, v. PLOWMAN.* E. T. 1801. K. B. 1 *East*, 441. S. P.

DOE, D. STEWARD, v. DANTON. M. T. 1785. K. B. 1 *T. R.* 11.

Ejectment for two messuages, two dwelling-houses, and two tenements. Motion in arrest of judgment, because of the uncertainty of the latter description. The Court made the rule absolute, referring to the cases of *Goodtitle v. Walton*, 2 *Str.* 834; and *Goodright v. Flood*, 3 *Wils.* 23. Or messuage and tenement.

5. *GOODTITLE, D. WRIGHT v. OTWAY.* E. T. 1807. K. B. 8 *East*, 357.

Plaintiff had declared for a messuage and tenement. A rule nisi had been obtained to arrest the judgment for its uncertainty. A motion was now made to enter the verdict according to the judge's notes for the messuage only. This was opposed, on the ground that it could not be done, unless the lessor of the plaintiff released the damages, which were entire, and could not be severed by the act of the Court. *Sed per Cur.* The rule obtained to enter the verdict as suggested must be made absolute. The damages need not be released: they were merely nominal, and will follow the verdict for the messuage, in the same manner as if the question had occurred at the trial, and the verdict had in the first instance been taken for the messuage only. But after verdict in an ejectment for a messuage and tenement, the Court gave leave, even pending a rule to arrest the judgment on the ground of

See 2 *Str.* 834; 1 *East*, 441; 1 *ibid.* 295; *Cro. Eliz.* 186.
uncertainty to enter a verdict according to the judge's notes for the messuage only.

(2) *Tithes.*

[585]

CAMELL v. CLAVERING. T. T. 1700. K. B. 2 *Ld. Raym.* 789.

In ejectment, after verdict for plaintiff, motion was made in arrest of judgment, that ejectment did not lie for small tithes. But the Court overruled the objection. Ejectment lies for small tithes.

(a 1) *Underwood*.†

(b 1) *Vestry*.‡

(c 1) *Watercourse*.§

VII. RELATIVE TO THE DECLARATION.

(A) IN GENERAL.

(a) *Whether by bill or original.*

DOE, D. THOMAS, v. ROE. H. T. 1814. K. B. 2 *Chit. Rep.* 171.

Motion for judgment against the casual ejector, stating that the declaration was by original, and the notice at the foot thereof was not "wheresoever, &c." but as in proceedings by bill in the King's Bench. *Per Cur.* It is sufficient. Declaration in ejectment being by original, and notice to tenant as if by bill, will not bar the entry of judgment.

(b) *How entitled.*

1. *ANON.* M. T. 1815. K. B. 2 *Chit. Rep.* 172. S. P. *ANON.* H. T. 1816. *id.* 173. S. P. *ANON.* E. T. 1817. *id.* 173.

The declaration was entitled T. T. 1816, which had not yet arrived, and

Wrong title of term

* By the 32 Hen. 8. c. 7. and not at common law, lies for tithes, or for a portion of tithes; see *Hard.* 57; *Cro. Car.* 301; *H. Jones*, 521. But it does not lie where the tithes are not taken in kind, but an annual sum is paid in lieu thereof; see *Dyer*, 116. (a.)

† Underwood is recoverable in ejectment; see 2 *Roll. Rep.* 482.

‡ Ejectment lies for "a certain place called the vestry;" see 3 *Lev.* 95.

§ Ejectment will not lie for a watercourse or rivulet, unless described as so many acres of land covered with water; see *Yelv.* 143. But it may be maintained for a pool of water, because the word comprehends both land and water; see *Co. Lit.* 5. (b.)

¶ In the King's Bench the proceedings may be either by bill or original: the latter however, is the most usual and preferable mode; because no writ of error can be brought, except in parliament. And in the Common Pleas, the declaration is always framed as if by original; see *Adams, Ejectment*, 181.

[586]
Therefore,
declaration
entitled M
T. 55 Geo
S. but no
tice dated
11th Jan.
1815, to a
pear next
Hilary
term, is
good.
The venue
is local;

(c) *Venue.*

Judgment was given in ejectment on a demise of three years. The defendant brought a writ of error, and sued out a *scire facias quare executio non*; to which the plaintiff in error pleaded, that he had paid 200*l.* in satisfaction of the term and damages; and, on issue joined, motion was made to change the venue out of Yorkshire into Middlesex. But the Court denied the motion because the ejectment was local.

And if laid
in a wrong
county, -
may be ob-
jected to af-
ter verdict:

3. **GOODTITLE, D. PINSERT, LAMMIMAN. M. T. 1815. K. B. 6 Esp. 128.**
The declaration described the premises as "situate in the united parishes of St. G. M. and St. G. B."—the evidence proved them to be in the parish of St. G. B. It was urged to be a ground of nonsuit; and of that opinion was Lord Ellenborough, C. J., who said, that for all purposes, except parochial, the parishes were distinct.

[587]
[said in the
[parish
[where it re-
[ally lies.
[But an aver-
[ment in a
[declaration
[made was averred, in a declaration in judgment, to be in the parish of
West Putworth and Broadworthy. At the trial they were proved to be part-
ly situated in the former, and partly in the latter. It was therefore objected
that the construction of the declaration was to describe all the lands as lying
in one parish, named West Putworth and Broadworthy; and that, since it was
in proof that there was no such parish, there was a fatal variance in the de-
scription of the premises. The plaintiff, however, recovered, and the Court
now confirmed the verdict.

Party's name inserted without his consent as one of several leaders, may be erased before appearance. But verdict in ejectment was set aside, the demise laid in the declaration proving to be without lesser's authority.

1. **DOE, D. SHEPHERD, v. ROE.** H. T. 1820, K. B. 2 Chit. Rep. 171.

2. **DOE, D. HAMMER, v. FILLIS.** H. T. 1818. K. B. 2 Chit. Rep. 170.

Ejectment on several demises: the plaintiff obtained a verdict only on the first demise, stated to have been made by the corporation of Plymouth. At the trial, evidence was given that the corporation had given no authority for

* The declaration should be entitled of the term immediately preceding the vacation in which it is delivered; see *Adams, Ejectment*, 181; and the demise and ouster are frequently laid after the term of which the declaration against the casual ejector is entitled, and no objection can be taken, because the nominal defendant cannot demur, and the real defendant, if he appear, must, by the terms of the consent rule, accept a declaration against himself of the subsequent term, and plead only the general issue; see 1 *Rich. C. P.* 311; 1 *Vent.* 135. And even the omission of stating a term is immaterial; see *Adams, Ejectment*, 181.

† Any names may be adopted for these nominal parties; but the common names, John Doe for the supposed plaintiff, and Richard Roe for the casual ejector, are preferable; though usual, it is not essential, to insert the supposed addition of the defendant; the stat. 1 Hen. 5. c. 5. not extending to declarations; see 3 B. & P. 399.

their names to be used; and, on this ground, and on an affidavit that no such authority had been given, the verdict was set aside.

3. *ANON.* H. T. 1816. K. B. 1 Chit. Rep. 573. n.; S. C. 2 id. 173.

Motion for judgment against casual ejector, upon usual affidavit of service. Defendant's real name was inserted at the beginning of the declaration instead of the casual ejector.

Per Holroyd, J. You may have your judgment; but it is worth your consideration, whether it will not be advisable to amend; for if the defendant should think fit to move, he may probably set aside the proceedings.

(c) *Day.* See *post*, div. Formal parts of Declaration, "Statement of the Demise."

(f) *To be written on one side of the paper only.*

DOE, D. IRWIN, v. ROE. T. T. 1822. K. B. 1 D. & R. 562.

A rule had been obtained (and which was now made absolute) to show cause, why the service of seventeen copies of declarations in ejectment upon as many tenants in possession, should not be set aside for irregularity, on the ground that the copies had been engrossed on both sides of the paper, contrary to the practice of the Court, and in fraud of the revenue laws, not being properly stamped conformably to the provisions of 48 Geo. 3. c. 149. s. 2. which requires, that all copies of proceedings, upon which the stamp of 4d. is imposed, should be written in the usual and accustomed manner in which such papers are written.

appearing that both sides of the paper had been written on to the prejudice of the revenue laws imposing a duty of 4d. a sheet.

(B) *FORMAL PARTS.*

(a) *Description of the premises,* (see also *ante*, 586. div. (c.) *Venue,*) or *subject matter of the action.*

CONNOR v. WEST. M. T. 1770. K. B. 5 Burr. 2672.

Per Lord Mansfield, C. J. It has been determined, over and over again, that such exact and precise certainty is not necessary in the declaration as in the *præcipe*.

(b) *Description of the situation.*

GOODRIGHT, D. SMALLWOOD, v. STROTHER. E. T. 1769. K. B. 2 Blac. 706.

In ejectment after verdict for the plaintiff, it was moved in arrest of judgment, that no vill was mentioned in which the lands demised lay; but on showing cause, it appeared that in the subsequent part of the declaration it was stated that the defendant at H. aforesaid, ejected the plaintiff from the said lands, &c. The Court held, that this amounted to a sufficient certainty that the lands lay in the vill of H.

(c) *Statement of the demise.*†

1, *BINER v. JUNER.* Summer Assizes, 1697. K. B. 1 Ld. Raym. 726.

It was ruled by Holt, C. J., that coparceners may join in ejectment; and he said, the case in *Moor*, 682. n. 939. was not law.

2. *DOE, D. LUDHAM, v. FENN.* H. T. 1812. K. B. 3 Campb. 190. S. P.

ROE, D. RAPER, v. LONSDALE. H. T. 1810. K. B. 12 East, 39. S. P.

DOE, D. MARSACK, v. READ. H. T. 1810. K. B. 12 East, 57.

* For a church, chapel; 11 Co. 25; cottage, house, or stable; 1 Lev. 58; Cro. Jac. 654; ought to describe them by the appellation of "messuage." But tenement; 2 Stra. 834; 1 Ld. Raym. 191; without an addition; 3 Mod. 38; messuage or tenement; 3 Wils. 23; or messuage and tenement; 1 East, 441. 1 T. R. 11; are too uncertain. Though a "certain place called a vestry;" 3 Lev. 95; kitchen, or rooms on a certain story, seems good; see 3 Lev. 95; 1 Stra. 95; 3 Mod. 210. So a declaration for a manor; Adams, Ejectment, 28; or mills, without stating what kind, is sufficient; 1 Mod. 70. In general, lands will be sufficiently described by the provincial terms of the counties in which they lie, as in Norfolk, "five acres of Alder Carr;" see Stra. 1063; Burr. 623. The term close is too uncertain, unless named, or the number of acres and their contents be described; 5 Burr. 2672; 4 Mod. 97. So, ejectment for the produce of land must be for the produce itself, as grass, and not for the land; see 2 T. R. 451. So, a watercourse or rivulet must be described as so many acres of land covered with water; see Yelv. 163; Co. Lit. 5. b.

† If there be any doubt as the party in whom the title is vested, it is usual to declare upon several distinct demises by the several persons concerned in interest; see Adams, Ejectment, 184.

Though the insertion of the real defendant's name at the beginning of the declaration instead of that of the casual ejector, was helden no bar to the entry of judgment.

[588] The service of several copies of declarations in ejectment was in this case held irregular, it

A declaration in ejectment* need not be as precise as the *præcipe*.

After verdict, the vill in which the premises lie may be collected from the vill in which the ejectment is laid.

The demise may be laid jointly by parceners,

[589] The declaration contained three several demises for the whole, 1st. by A.,
Or joint-tenants, 2d, by B., and 3d, by C.; all of which were laid on the same day. It appeared that they had jointly granted a lease to the defendant, under which he had paid rent, but which had expired. It was argued that it must be taken that the lessors of the plaintiff were joint-tenants; and, as there was not any joint demise, the plaintiff could not recover.

Sed per Lord Ellenborough, C. J. By the three demises, the nominal plaintiff must be considered to have the same interest in him which was formerly conveyed to the defendant by the lease, which has expired. No incongruity will appear on the record; for the premises are stated different in each demise, and no inconvenience will follow to the defendant, for only one writ of possession can be taken out; he can only become ejected. If the judgment should be in any manner abused, the Court can interfere by staying proceedings.

3. *HEATHERLY, D. WORRINGTON, v. WESTON.* E. T. 1763. C. P. 2 Wils. 232.

But tenants in common cannot allege a joint demise. In ejectment, after verdict for the plaintiff, the question was whether tenants in common can make a joint demise? The lease in the declaration being laid to be of the joint demise of the plaintiff's lessors, who appeared to be tenants in common, the whole Court were of opinion, that tenants in common cannot join in making a lease; for their estates are several and distinct, and there is no privity between them.

4. *DOE, D. BRYANT, v. WIPPLE.* T. T. 1795. K. B. 1 Esp. 360.

Under a joint demise of the whole, an undivided moiety may be recovered. In ejectment, by two tenants in common, the declaration stated a joint demise of the whole, and a separate demise by each, but of the whole premises. Lord Kenyon, C. J., held that under a demise of the whole, an undivided moiety might be recovered.

5. *GOODTITLE, D. GALLAWAY, v. HERBERT.* E. T. 1792. K. B. 4 T. R. 680.

The defendant was in possession of certain premises, in which possession she was to continue until Michaelmas, 1791. In the spring of that year, there was a parol agreement entered into between the lessor of the plaintiff (her landlord) and the defendant, that she should hold the premises from the Michaelmas, 1791, for four, eight, or twelve years. The lessor brought ejectment, and laid his demise on the 1st of October; possession was demanded on the 5th of the same month, but refused. Some repairs were done by the defendant a few days after the agreement was made. The defendant had a verdict, which it was moved should be set aside. But the Court were of opinion that the plaintiff could not recover, he having laid his demise on a day prior to the determination of the tenancy.

6. *ROE, D. WRANGHAM, v. HERSEY.* M. T. 1771. C. P. 3 Wils. 274.

And where, on the demise of an heir by descent, the demise was laid on the day his ancestor died, it was holden good after verdict.† The lessor of the plaintiff claimed by descent from his ancestor, who died on the 1st day of January, 1771, at five o'clock in the morning; and the demise was laid in the declaration on the same 1st of January, to hold from the 31st day of December then last past.

Per Cur. If my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven o'clock, it is a good lease. It is said, there is no fraction in a day, but this a fiction in law, *fictio juris neminem ledere debet*; but aid much it may, and this is seen in all matters where the law operates by re-

* And it is usual to lay the demise as far back as the lessor's title will admit, and if there be any doubt as to the period at which the title accrued, different demises on several days must be alleged; see Burr. 665. And when an entry is essential to support ejectment, the demise must be laid subsequent to the entry; see And. 126; Stra. 1086; Willes, 327.

† In an ejectment by the surrenderee of copyhold premises, the demise may be laid against all persons *but the lord*, on a day between the time of surrender and admittance, provided the surrenderee be admitted after trial; *Holdfast v. Clapham*, 1 T. R. 500. abridged *ante*, vol. vi. p. 407. But the assignees of a bankrupt cannot lay the demise before the date of the bargain and sale; *Doe, d. Esdaile, v. Mitchell*, 2 M. & S. 446. abridged *ante*, vol. iii. p. 817. So in ejectment by the assignee of the insolvent debtor, the demise must be laid after the actual execution of the assignment; *Doe, d. Whatley, v. Telling*, 2 East, 267. abridged *post*, tit, Insolvent Debtor. So, in ejectment by overseers, the demise

lation, and division of an instant, which are fictions in law. If a man were born on the 1st of February, and lived to the 31st of January, twenty-one years after, and at five o'clock in the morning of that day makes his will, and dies by six at night, that will is good, and the deviser is of age; 2 *Ld. Raym.* 1036.—In 1 *Lutw.* 108. and *Small, d. Baker, v. Cole and Skinner*, 2 *Burr.* 1162, amendments in ejectment are carried much further than formerly. 1st, A verdict cures a defect in setting out the title, though it cannot cure a defective title; 2dly, After a verdict, if the objection be grounded upon the mere mistake of the clerk, or a trifling nicety, there is no need of any actual amendment at all, the Court will overlook the exception. By fiction in law, the whole term, the whole time of the assizes, and the whole session of parliament, may be, and sometimes are, considered as one day; yet the matter of fact shall overturn the fiction, in order to do justice between the parties.

7. *DOE, D. SHERE, v. PORTER.* H. T. 1789. K. B. 3 T. R. 13. S. P. *BEDFORD v. DENDION.* M. T. 1764. K. B. Bull. N. P. 1066.

In ejectment, the term was laid to "have and to hold the said premises for seven years." On demurrer it was contended that the lessor of the plaintiff had not such a quantity of interest as would support a demise for seven years. But, the Court said: the interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration, the whole of which being an absolute fiction.

8. *ROE v. WILLIAMSON.* T. T. 1674. K. B. 2 *Lev.* 140.

The lease declared upon was for five years. The jury found that the plaintiff had only a lease for three years.

Hale, C. J., and Wilde, J., held that, though in ejectment the lease is fictitious, yet the plaintiff must declare on such a lease as suits with the title of his lessor here. If he recover at all he must recover a term which is two years longer in duration than his title. But Twisden, J., differed.

9. *PURLEV, D. MAYOR OF CANTERBURY, v. WOOD.* T. T. 1794. K. B. 1 *Esp.* 199.

In ejectment, the plaintiff declared on a demise from the corporation of Canterbury. It was objected that the deed should be proved.

But, per Lord Kenyon, C. J. As a corporation could only make a lease by deed, under the corporation seal, the same rule holds as in the common case of a demise, which never is proved.

10. *PARTRIDGE v. BALL.* H. T. 1695. K. B. 1 *Ld. Raym.* 136.

In ejectment for lands on the demise of the corporation of Bury, after verdict, it was moved, in arrest of judgment, that it does not appear on the record that the lease was by deed. But it was adjudged that it was aided by the verdict.

11. *NOKE v. WINDHAM.* E. T. 1725. K. B. 1 *Stra.* 694. S. P. *ANON.* T. T. 1773. K. B. *Cowp.* 128.

The lessor of the plaintiff being an infant, the Court obliged him to name a good plaintiff, who might be answerable for costs.

(d) *Statement of the entry.*† (e) *Statement of the ouster.*‡

(f) *Statement of the notice to appear.*

1. *DOE, D. THE GOVERNORS OF THE HOSPITAL OF ST. MARGARET, WESTMINSTER, v. ROE.* E. T. 1817. C. P. 1 *Moore*, 113.

This was a motion for judgment against the casual ejector. The notice at the bottom of the declaration, it appeared, had been affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant should be laid by the overseers for the time being when the ejectment is brought, if the tenant has done any act recognizing the holding; if not, the demise must be laid to the set of overseers to whom he has acknowledged a tenancy; see *Doe, d. Grundy, v. Clarke*, 14 *East*, 488. abridged *ante*, p. 570.

* See *ante*, vol. vi. p. 635. 640.

† It is not necessary to allege any time of entry; see 2 *Roll. Rep.* 466; *Latch.* 199.

‡ The ouster shall be stated to have been after the commencement of the supposed demise, and it is not unusual, though unnecessary, to mention a particular day; see *Cro. Jac.* 311; *Selw. N. P.* 638. 4th Ed.

generally. The Court deemed such service insufficient; as, if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession.

And it is better to insert both christian and sur names;

2. ANON. T. T. 1818. K. B. 1 Chit. Rep. 573. n.

Motion for judgment against the casual ejector, the second name of the tenant in possession in the declaration and notice being in initials, as John B. Jones, for John Benjamin Jones,

Abbott, C. J. I think it sufficient.—Rule for judgment accordingly.

For, where the christian name of the tenant was omitted, it was held irregular;

3. DOE, D. ———, v. ROE. T. T. 1819. K. B. 1 Chit. Rep. 573.

Motion for judgment against casual ejector. The notice to appear at the bottom of the declaration merely described the party as Mrs. Hicks, without tenant was any Christian name. The defendant's person was sworn to, as being the tenant in possession. Nothing was, however, taken by the motion.

4. DOE, D. PEARSON, v. ROE. M. T. 1820. C. P. 5 Moore, 73.

Several tenants had been duly served with a copy of the declaration in ejectment. The notice at the foot of the declaration had not been addressed to any or either of them. A motion was now made for judgment against the casual ejector. The Court granted the application.

any of the tenant, who, it however appeared, had been all duly served, is not material.

5. HOLDFAST v. FREEMAN. T. T. 1735. K. B. 2 Stra. 1049.

The notice should be to appear on the first day of the term;*

The notice in ejectment was to appear on the essoign day of this term; and held ill; for it should be to appear the first day in full term, which is the appearance day.

6. ANON. E. T. 1817. K. B. cited Adam's Ejectment, 203.

[593]

And the term is usually named; and if delivered in vacation on day antecedent to the assize day of Easter term, the tenant must appear in that term.

A declaration delivered in Hilary vacation, was entitled of Easter term, and the notice was to appear on the first day of next term. The Court granted the rule absolute, for judgment against the casual ejector in the first instance, during Easter term, considering that the tenant could not be misled by the wrong title to the declaration, so as to imagine he had until Trinity term to appear, inasmuch as the declaration was delivered, and the notice dated one day antecedent to the assize day of Easter term.

7. DOE v. GREAVES. H. T. 1830. K. B. 2 Chit. Rep. 172.

And notice to appear Trinity term next, instead of Hilary term next, is available,

Notice at the foot of the declaration required the defendant to appear in Trinity term next, instead of Hilary term next. Holroyd, J., was of opinion, that the error did not vitiate the proceedings.

8. ANON. T. T. 1814. K. B. 2 Chit. Rep. 171

If the tenant be cognizant of the mistake.

Motion for judgment against the casual ejector, notice had been given for Hilary instead of Trinity term, but the tenant in possession was afterwards informed of the mistake.—Rule nisi.

9. LARKLAND, D. DOWLING, v. BADLAND. E. T. 1823. C. P. 8 Moore, 79.

And judgment will not be allowed to be signed when the notice to appear is irregular.

In the notice to appear, at the foot of a declaration in ejectment, the tenant was required to appear in eight days of St. Hilary, instead as of Hilary term generally; the Court would not allow final judgment to be signed, but left the party to bring a fresh action, as the notice was irregular and void.

10. HAZLEWOOD, D. PRICE, v. THATCHER. T. T. 1789. K. B. 3 T. R. 351.

The notice should be subscribed in the name of the casual ejector;

Motion to set aside proceedings in ejectment. The irregularity complained of was, the notice at the foot of the declaration being subscribed in the name of the nominal plaintiff, instead of the casual ejector. On reference to the Master, the Court thought this was not a sufficient ground to set aside the proceedings.

but where it was in the name of the nominal plaintiff, it was deemed good.

* Where the premises are situated in London or Westminster. But where they are in any other county, if the notice be served before the essoign day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity term respectively following; see 4 B. & A. 539; 2 B. & B. 705.

11. ANON. E. T. 1821. K. B. MS. cited 1 D. & R. 435. n.

The question that arose in this case was, whether, under the stat. 1 Geo. 4. c. 87. the notice at the foot of the declaration in ejectment, should be signed by Richard Roe, as was the practice before the passing of the act, or by the landlord. Abbott, C. J., referred to the statute, and was clearly of opinion, that the notice ought to come from the landlord.

(C) AS TO THE SERVICE.

(a) *At what time.**

(b) *On whom.*

1st. *In General.*

1. *Of the general rule.*

DOE, D. — v. BADTELLE. H. T. 1809. K. B. 1 Chit. Rep. 215.

A motion for judgment against the casual ejector was refused, it appearing from the affidavit on which it was founded, that the declaration was served on a party on the premises, whom deponent believed to be tenant in possession, but that the notice at the foot of the declaration was not addressed to such person.

2. *Upon the tenant himself.†*

3rd. *Upon the tenant's wife, child, brother, or servant.*

1. DOE, D. BADDAM, v. ROE. M. T. 1799. C. P. 2 B. & P. 55.

The Court were of opinion, in this case, that service of a declaration in ejectment on tenant's wife, at his dwelling-house, was sufficient.

2. DOE, D. MORLAND, v. BAYLISS. T. T. 1796. K. B. 6 T. R. 765. S. P. RIGHT V. WRONG. 2 D. & R. 86. S. P. 1 N. R. 308.

In ejectment, the affidavit stated, that the declaration was served on the wife of the tenant in possession at her husband's house, but did not state that this house was on the premises. The Court held it sufficient; and the reason why it is necessary to state in the affidavit that the service was on the wife at the husband's house, is to show that they were living together as man and wife.

3. ANON. T. T. 1816. K. B. 1 Chit. Rep. 500. n.

Motion for judgment against the casual ejector, on an affidavit stating that the service of the declaration had been made on the wife on a part of the demised premises, but omitted to state that the defendant was tenant in possession. He contended, however, that it was impliedly affirmed.

Bayley, J. I think so; and the affidavit seems to me to be sufficient.

4. GOODTITLE, D. — v. BADTITLE. T. T. 1819. K. B. 1 Chit. Rep. 499. [595] S. P. ANON. T. T. 1814. K. B. 1 Chit. Rep. 500. n.

Motion for judgment against the casual ejector. The declaration had been served on the wife of the tenant in possession, who lived upon the premises. This was considered insufficient evidence of service, the Court deeming it requisite that the affidavit should have stated that the wife lived with the husband, or that the service was made on the premises, or at the husband's house.

5. ROE, D. HAMBROOK, v. DOE. T. T. 118. K. B. 14 East, 441.

It appeared that service of a copy of a declaration, &c., in this action of ejectment, had been made before the essoign day of the term, on the daughter of the tenant in possession, in the absence of him and his wife, and that the tenant had since declared that he had received the same. It did not, however, appear, that he had received it before the essoign day; and this, the court decided, was imperatively requisite.

6. DOE v. ROE. M. T. 1822. K. B. 1 D. & R. 12.

Motion for judgment against the casual ejector. The affidavit stated, that the tenant in possession was confined to her bed room; that service on her (as tenant in possession) of the declaration in ejectment, was made by leaving it with her daughter; who, the day before the essoign-day of the term, acknowledged service on the daughter.

* The declarations must be served before the essoign day of the term; see Barnes, 172; 14 East, 441.

† The declaration should, if possible, be served upon the tenant in possession; see 2 Stra. 1064. in which case it may be served off the premises; see Tidd 435

edged that she had read it to her mother. By the Court; you have shown sufficient only for a rule *nisi*. It was afterwards, without any cause being shown, made a rule absolute.

7. *RIGHT, D. FREEMAN, v. ROE.* H. T. 1814. K. B. 2 Chit. Rep. 130.

Brother, The brother of the tenant in possession had been in this case served with the declaration in ejectment. The tenant had made no acknowledgment of a receipt thereof. A motion for entering ejectment against the casual ejector was, under these circumstances, refused.

8. *DOE, D. M'DOUGALL, v. ROE.* M. T. 1819. C. P. 4 Moore, 20.

Or son; for where service had been on tenant's son, but there had been no acknowledgment [596] An affidavit of service of a copy of the declaration, and notice in ejectment on the son of the tenant in possession, and that the tenant had acknowledged that he had received the same, was produced in this case, but was held by the court insufficient, as the affidavit did not state that the acknowledgment was before the essoign day.

9. *SMITH, D. STOURTON, v. HURST.* T. T. 1791. C. P. 1 H. Bl. 644.

before the essoign day it was held insufficient; Though in C. P., where the service was upon the daughter, and after the essoign day the wife acknowledged that she had received the declaration, it was holden sufficient. On motion for judgment against casual ejector; it appeared that the service was upon the daughter, the husband and wife being absent; and, on a subsequent day, the wife acknowledged that she had received the declaration, and delivered it to the attorney, who then read it over to her, and explained it; upon which the wife said that the paper should be sent to her husband. The Court at first seemed to think that the affidavit ought to have stated that the declaration came to her hands before the essoign day of the term. But on the authority of *Goodtitle v. Thornton*; Barnes 183, the rule was made absolute.

10. *ROE, D. AKINS, v. ROE.* H. T. 1815. K. B. 2 Chit. Rep. 1814.

Service on tenant's servant on the premises suffices, no one else being there. A rule was in this case made for judgment against the casual ejector, where rule *nisi* was served on the servant of the tenant in possession on the premises, which were locked up, and no body in them, except the servant, who had the keys of the premises, the declaration having been served on the servant under nearly the same circumstances.

11. *ANON.* T. T. 1813. K. B. 2 Chit. Rep. 182.

If the import of the declaration be explained, Motion for judgment. The declaration was served on the servant maid to carry it to her mistress; she did so, and returned, saying that she had delivered it to her. The affidavit, however did not state that it had been explained to the servant, or that she had been desired to explain it to her mistress, or that she had so explained it.—The Court only granted a rule *nisi*.

12. *ROE, D. FENWICK, v. DOE.* T. T. 1819. C. P. 3 Moore, 576. *S. P. DOE, D. JONES, v. ROE.* H. T. 1814. K. B. 1 Chit. Rep. 213.

And the principal be absent to avoid the particular process in the action, A. B. tenant in possession, left England and resided at Calais, for the purpose of avoiding his creditors. The trustees were charged with an annuity to the lessors of the plaintiffs, to whom a right was reserved to enter, receive the rents, and sell. A motion was now made for judgment against the casual ejector, on an affidavit that a declaration was duly served on the premises, and a copy thereof affixed to the outer door. The Court refused the motion. A rule *nisi* was then applied for, that service of the declaration on the solicitor of such tenant should be deemed good. This motion was, however, also unsuccessful.

13. *DOE, D. HALSEY, v. ROE.* H. T. 1819. K. B. 1 Chit. Rep. 100.

And the tenant, Declaration in ejectment. It was shown that it had been served on the servant of the tenant in possession. It did not, however, appear by affidavit that the tenant had ever acknowledged its having come to his hands. The Court held such service insufficient.

[597] 14. *DOE, D. TEVERELL, v. SNEE.* M. T. 1822. K. B. 2 D. & R. 5.

Or his attorney has since acknowledged its receipt. Motion for judgment against the casual ejector, on an affidavit of service of the declaration on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter that the declaration had been received.—A rule *nisi* was granted.

4. *Upon occupiers as contradistinguished from tenants.*

1. GULLIVER, D. CLARKE, v. SWIFT. 1759. K. B. 2 Kenyon, 511.

The premises in question were let by C. D. to one A. B., a labourer, who worked for C. D.; A. B. lived there with his wife, without paying any rent. The declaration was served on A. B.'s wife, who gave it to her husband, who delivered it to C. D. The Court held the service good, and said there is no need that the person in actual possession should be a tenant, paying rent.

An ejectment served on the occupier of a house, not paying rent, is good.

2. ANON. M. T. 1816. K. B. 2 Chit. Rep. 178.

Motion for judgment against casual ejector, on an affidavit, that the tenant in possession being out of the way; her attorney directed that the declaration should be sent by the twopenny post to the tenant's last place of abode. The affidavit also swore that service had been made on the premises, on a person whom the deponent believed to have been left there by the tenant in possession, and also on the attorney.—Rule nisi granted.

So, service on person left by tenant in possession, or on tenant's attorney, and a letter sent to tenant's last place of abode, are sufficient.

3. DOE, D. WALKER, v. ROE. T. T. 1815. Ex. 1 Price, 399.

On motion for judgment against the casual ejector, the affidavit stated the service of the declaration in ejectment, in the name of the tenant, on a person representing himself to be in possession for the tenant, then temporarily absent, and that he afterwards acknowledged an appraisal of the service. The Court held that the affidavit ought to have shown that the person who was the object of such service was the tenant in possession.

Provided the affidavit states that the object was to serve the tenant in possession.

2d. *In particular.*

1. *Where there are several tenants.*

1. DOE, D. ELWOOD, v. ROE. T. T. 1819. C. P. 3 Moore, 578.

It was urged that the service of the declaration in ejectment to recover certain premises from two tenants was good, under the following circumstances. There had been a personal service on one of the tenants, and an explanation given to him, and a service of declaration on him for the other tenant.

Service of declaration on one of two tenants [598] himself and his co-tenant, will not suffice;

Sed per Cur. It does not appear that the declaration ever came to the possession of the other.

2. ROE, D. BROMLEY, v. ROE. H. T. 1819. K. B. 1 Chit. Rep. 141.

Motion for judgment against the casual ejector on affidavit of service of declaration on one of four tenants in possession. *Per Cur.* We think this service is not sufficient, because the affidavit does not show that all the four tenants were actually in possession.

Unless they appear by affidavit to have been all in possession;

3. RIGHT, D. —, v. WRONG. H. T. 1817. K. B. 2 Chit. Rep. 175.

Motion for judgment against the casual ejector. The service of the declaration had been on one of three tenants in possession. The affidavit did not state them to be joint tenants. Lord Ellenborough, C. J., thought that the service upon one of two persons in possession was sufficient.

Though Lord Ellenborough is reported to have held contrary;

4. DOE, D. FIELD, v. ROE. T. T. 1815. K. B. 2 Chit. Rep. 174.

Motion for judgment against the casual ejector. There were two tenants in possession, being joint tenants and copartners in trade: service of the declaration was good as to one, but the other had not been served at all. Bayley, J. said, that there must be a rule to show cause.

And Bayley, J. said it only authorised a

5. DOE, D. BAILEY, v. ROE. H. T. 1799. C. P. 1 B. & P. 369. S. P. ANON. H. T. 1814. K. B. 2 Chit. Rep. 176.

The declaration had been served on one of two tenants in possession. The question was, whether it was good service. *Per Eyre, C. J.* I do not know that we have ever construed the rule of court so strictly, as to hold that a service on one of two tenants in possession may not be considered as a good service.—Rule absolute.

rule nisi for judgment against the casual ejector.

2. *Upon one who personates or represents the tenant.*

1. DOE, D. JAMES, v. STANTON. H. T. 1819. K. B. 2 B. & A. 371.

It appeared that the defendant in this action of ejectment, on being served with a declaration, assented to the character of tenant in possession, and afterwards appeared and pleaded. It was shown also that defendant was in the situation of a servant, and managed the business for the real owner of the pre-

But in another they made the rule absolute.

Evidence of defendant's assuming the charac

ter of ten ant in pos session, and in that char acter accep ting a dec [599] laration in ejectment, is sufficient for a jury to find that he actually was so. So, an at torney rep resenting himself as agent of ten ant may be served. After sever al ineffectu al attempts made to serve a ten ant, if a ser vant admits that he is in the house, but cannot be seen; Or that or ders have been given to take in no papers, the declara tion may be served on the latter. And where a maid ser vant open ed the win dow, deni

mises. At the trial it was contended that, as there was no evidence to show an occupation, or a claim to occupy in his own right, the defendant must be taken to be a mere servant, against whom an ejectment will not lie. The learned judge being of this opinion, the plaintiff was nonsuited. A rule nisi for setting aside this nonsuit having been obtained; the Court said, it is sufficient to subject a party to this action, that he has the visible occupation of the premises, and it is not necessary that he should have such an interest as to enable him to maintain trespass. When a servant is served with a notice of ejectment as tenant in possession, it is competent for him to explain his situation, and so to set the other party right; not, as he seems to have done in this case, to mislead him. If he adopts the latter course, it is very possible that a jury may think that he ought to be considered as the tenant in possession.

2. ANON. T. T. 1816. K. B. 2 Chit. Rep. 181.

A rule nisi was in this case granted for judgment against the casual ejector, where service of the declaration was made on an attorney, who represented himself to be the agent for the tenants in possession, and would appear for them.

3rd. Where tenant resists service, or refuses to be seen.

1. DOE, D. HARVEY, V. ROE. H. T. 1816. Ex. 2 Price, 112.

In ejectment, it appeared that the deponent had called several times on the tenant in possession, for the purpose of serving him personally. On some occasions he was told by the servant that he was not at home, and at last he was informed that his master, who was then at home, would not see him, unless he sent his name and message. On that intimation, the deponent delivered the declaration to the servant. The Court granted a rule to show cause why this service should not be sufficient.

2. DOUGLAS V. ———. M. T. 1723. K. B. 1 Stra. 575.

On an affidavit, that they had tendered a declaration in ejectment, and that the servants refused to call their master, or receive it, saying, they had orders to take no papers, the Court was moved, that leaving it at the house might be sufficient; which was ordered accordingly.

3. FENN, D. TYRREL, V. DENN. T. T. 1716. K. B. 2 Burr. 1181.

The affidavit in support of a rule to show cause why the service of the declaration should not be deemed sufficient, stated that A. B. was either at home or out, but was denied; and that the servant maid being at home opened the window, but refusing to open the door, and denying that her mistress was at home, a copy was thrown in at the window, and another was fixed on the door, and the servant was told the effect of it, and the original shown to her. The Court made the rule absolute. ed her mistress, and refused to open the door, a declaration thrown in at the window was held properly served.

[600]

So, where declaration was put on a table before tenant, more direct service being prevented by his son, it was held sufficient.

So, tenant's servant may, if he resists giving possession of pre

4. ANON. T. T. 1816. K. B. 2 Chit. Rep. 185. S. P. DOE, D. HANIFER, V. ROE. T. T. 1816. K. B. 2 Chit. Rep. 186.

A rule was made absolute for judgment against the casual ejector, where the declaration was put on the table before the defendant, but could not be delivered to him, as the defendant's son prevented the person from serving it.

5. ANON. M. T. 1816. K. B. 1 Chit. Rep. 574. 2. S. P. DOE, D. ATKINS, V. ROE. M. T. 1816. K. B. 2 Chit. Rep. 179.

Motion for judgment against the casual ejector, on an affidavit which stated in substance that the tenant in possession had died but a very short time ago, and that his goods were in the house, and a servant in possession. The notice at the foot of the declaration was addressed to the tenant in possession, or his personal representatives, and the service thereof was on the servant in possession. Sed per Holroyd, J. I think it is insufficient; some other course must be taken. Perhaps the lessor of the plaintiff had better endeavour to get possession, and if the servant who is in possession resists, the plaintiff had better treat him as tenant, and serve him with a declaration. mises, he treated on his master's death as tenant.

4. Upon receiver appointed by Court of Chancery.

GOODTITLE, D. ROBERTS, v. BADTITLE. H. T. 1799. C. P. 1 B. & P. 385. Service on

The declaration in this case had been served on one A. B., who had been appointed by the Court of Chancery to manage the estate, to recover which this action had been instituted, there being no tenant in possession. The Court were of opinion that this service was insufficient.

5. In case of lunacy.

DOE, D. LORD AYLESBURY, v. ROE. H. T. 1814. K. B. 2 Chit. Rep. 183.

A rule nisi was granted in this case why judgment should not be signed against the casual ejector, on an affidavit that service of the declaration had been made on one A. B., who had the care of the person and the management of the affairs of the tenant in possession, who was a lunatic. This was only a rule nisi, the party not having been appointed by a regular committee.

6. In the case of executors.

DOE, D. POWEL, v. HURST. H. T. 1819. K. B. 1 Chit. Rep. 162.

The declaration in an action of ejectment had been served on two joint executors of the late tenant in possession, but the affidavit did not state that they were tenants in possession. On this ground a motion for judgment against the casual ejector was refused.

tenants in possession to legalize the service of a declaration in ejectment on them.

7. In case of ejectment for a chapel.*

8. In case of ejectment for poor-house.†

(c) Where the possession is vacant.

1. SPRIGHTLY, D. COLLINS, v. DUMB. H. T. 1761. K. B. 2 Burr. 1116.

On a motion to show cause why judgment should not be entered up against the casual ejector, on an affidavit that B., the tenant in possession, absconded and that the plaintiff had personally served his niece, who was the only manager of his house, and resided in it; the Court made a rule on the tenant in possession to show cause "why judgment should not be entered up against the casual ejector." And ordered, that if no person was in the house, then the declaration to be affixed to the door, &c.

2. FENN, D. BUCKLE, v. ROE. T. T. 1805. C. P. 1 N. R. 293. S. P. Doe, D. HILL, v. ROE. M. T. 1816. K. B. 2 Chit. Rep. 178.

The declaration in an action of ejectment had been served by nailing it on the barn-door of the premises, in which barn the tenant had occasionally slept, there being no dwelling house, and the tenant not being to be found at his last place of abode. The Court deemed the service good.

3. ANON. T. T. 1814. K. B. 1 Chit. Rep. 505. n.

The copy of a declaration in ejectment had been stuck up on the gateway of the tenant's premises. The Court deemed such service insufficient, it not being sworn that defendant kept out of the way.

4. ANON. T. T. 1813. K. B. 1 Chit. Rep. 505. n.

The lessor of the plaintiff had, in this case, been twice unsuccessful in finding defendant at his dwelling-house, and had therefore stuck up the declaration on the premises. The question was, whether there had been a sufficient service. Le Blanc, J. held, that enough had not been done by the lessor of the plaintiff.

ly appeared that the lessor of the plaintiff had been twice unsuccessful.

5. DOE, D. LOVELL, v. ROE. T. T. 1819. K. B. 1 Chit. Rep. 505.

Ejectment for a stable. It appeared that a copy of the declaration had been affixed on the stable door, as no one was therein. The party who stuck it on went to the dwelling-house of the defendant, and informed him what had been done. The Court refused a rule to show cause why the service of the declaration in ejectment should not be deemed good service. one being therein, and afterwards going to defendant's house and informing him of it, is insufficient service.

* In an ejectment for a chapel, the service may be made on the chapel-wardens, or on the persons to whom the keys are entrusted; see *Ran. Ejectment*, 136.

† In ejectment for a poor-house, a service of the declaration upon the church-wardens and overseers was held sufficient, although they did not occupy the house, otherwise than by placing the poor in it; see *Barn*. 181.

Service on a person appointed by the Court of Chancery to manage an infant's estate will not avail.

Service on persons having care of a lunatic was allowed.

Executors of late tenant in possession must appear to be

[601]

If the premises be empty, the declaration may be affixed to the outer door.

But it must appear that defendant keeps out of the way.

For, it is not sufficient to nail declaration on premises, where it on

[602]

So, affixing the declaration for a stable on the stable door, no

Service of declaration on tenant occupying part of premises, and affixing a copy on the door of the other part, which was vacant suffices.

Declaration being pushed through an iron grating in Newgate held good service.

Service being had as to some defendants, will not affect proceedings against the others.†

No explanation is required where the interested party says he understands the contents of the declaration.

In K. B.,‡ however, the explanation to the tenant must be previous to the assign day.

The husband is not bound by the mere acknowledgment of his wife, that he had received a declaration in ejectment;

Though in another case a rule nisi was granted;

And also where defendant's attorney acknowledged receipt of declaration from

(d) *Where the possession is partially vacant.*

DOE, D. EVANS, v. ROE. T. T. 1820. C. P. 4 Moore, 469.

Action of ejectment to recover certain premises. One part of the premises was vacant. An affidavit was produced to ground a motion for judgment against the warrant of ejectment, stating, that a copy of the declaration had been served on the tenant who occupied one part, and that another copy was affixed on the door of that part which was vacant. The Court granted the motion.

(e) *Off the premises.**

WRIGHT, D. BAYLY, v. WRONG. H. T. 1817. K. B. 2 Chit. Rep. 185.

A rule nisi was granted by the Court for judgment against the casual ejector, on an affidavit that the tenant in possession was in Newgate, and the person serving the declaration pushed it through the iron grating to him and in his presence.

iron grating in Newgate held good service.

(f) *As to being good for part, and bad as to the residue.*

DOE, D. MURPHY, v. MOORE. T. T. 1814. K. B. 2 Chit. Rep. 176.

Motion for judgment against two defendants, who had been properly served with a copy of declaration. There were three defendants. The service as to the third was imperfect.—Rule granted.

(g) *As to the explanation and acknowledgment thereof.* See ante, 594. div. 3d.

As to the service "upon the tenant's wife, child, brother, or servant."

1. ANON. E. T. 1815. K. B. 2 Chit. Rep. 184.

Motion for judgment against the casual ejector, on an affidavit that the person serving the declaration went to the house, and found it shut up, and the tenant in possession, looking out of the window, said, that he knew what the declaration was. The wife came to the door and said that the declaration could not be served when the house was shut up.

Dampier, J., at first thought that the affidavit should have stated that the declaration was explained to them. But, concluding that the parties knew what was, granted a rule nisi.

2. DOE v. ROE. T. T. 1822. K. B. 1 D. & R. 563. S. P. DOE, D. TINDALE, v. ROE. T. T. 1815. K. B. 2 Chit. Rep. 180.

The declaration in ejectment had been served before the assign day of the term; but the explanation to the tenant in possession did not take place till after. Bayley, J., held, that the lessor of the plaintiff was not entitled to judgment.

tenant must be previous to the assign day.

3. GOODTITLE, D. READ, v. BADTITLE. H. T. 1799. C. P. 1 B. & B. 384.

Per Eyre, C. J. If a declaration be served on the wife of the tenant in possession, and, she neglect to deliver it to her husband, he must answer for her default. But it would be going further than we have ever yet gone, to admit the mere acknowledgment of the wife to bind the husband.

4. ANON. M. T. 1815. K. B. 2 Chit. Rep. 182.

Motion for judgment against the casual ejector, on an affidavit that the declaration was served on the son of the tenant in possession, who said that his father was unable to attend to any business; and that a person, representing herself to be the wife of the tenant in possession, admitted that the tenant in possession had been served with a declaration. Le Blanc, J., thought it insufficient service, but granted a rule nisi.

case a rule nisi was granted;

5. ANON. T. T. 1813. K. B. 2 Chit. Rep. 187.

A rule nisi was granted for judgment against the casual ejector, on an affi-

* The service of a declaration off the premises, or not at the tenant's actual dwelling, is confined to a personal service; see Adams, Ejectment, 207.

† So, when the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; see Adams, Ejectment, 213.

‡ Though in C. P. it may be after the assign day; see ante, p. 596.

§ The rule requiring an acknowledgment does not hold where the declaration is personally served on the party sought to be charged.

davit that the defendant's attorney had acknowledged that he had received the declaration from his client.

6. GOODTITLE, D. MORTIMER, v. NOTITLE. M. T. 1822. K. B. 2 D. & R. 232.

The service of the declaration in ejectment in this case was upon the servant of the tenant in possession, on a Saturday, with an affidavit of acknowledgment by the tenant, on Sunday, that he had received the declaration.

The Court held it insufficient.

(h) *Affidavit of.*

1st. *When to be made.**

2d. *By whom.*

GOODTITLE, D. WANKLER, v. BADTITLE. H. T. 1800. C. P. 2 B. & P. 120.

Motion for judgment against casual ejectment. The affidavit was made by a person who swore that he saw the tenant in possession served, and heard the person who served him with it acquaint him with the true intent and meaning of the declaration and notice. The Court held this affidavit sufficient.

3d. *Before whom.†*

4th. *Formal parts in.*

1. ANON. H. T. 1814. K. B. 2 Chit. Rep. 181. S. P. DAVENPORT v. KIRK-LY. E. T. 1738. K. B. Andrews, 368.

Motion that the service of a declaration might be deemed good service. The affidavit was, however, it appeared, entitled with the names of the real defendant, instead of Richard Roc.

Bayley, J., said, that it was then no affidavit in the cause at all; and, if the rule nisi was to stand, the plaintiff might be turned round.

2. DOE, D. SEABROOK, v. ROE. E. T. 1820. C. P. 4 Moore, 350.

Motion for judgment against the casual ejector. It appeared that there had been a vacant possession. One copy of the declaration had been fixed on the premises, and another served on the lessee, but not on the premises. The Court refused the rule, on the ground that the affidavit did not state that the copy was served on him on the premises.

3, DOE, D. WORTHINGTON, v. BUTCHER, H. T. 1820. K. B. 2 Chit. Rep. 174.

The Court ordered a rule for judgment against the casual ejector to be drawn up, although the title of the cause in the declaration was "Doe, on the demise of Phillip Worthington and James Worthington, v. Butcher;" and, in the affidavit of the service of the declaration, the cause was entitled "Doe, on the demise of James Worthington and Phillip Worthington, v. Butcher, vice being "Doe, d. of A. and B., v. B.," and "Doe, d. of B. and A., v. B.," was holden immaterial.

4. DOE, v. ROE. H. T. 1819. K. B. 1 Chit. Rep. 228.

An affidavit of the service of a declaration in ejectment omitted to state in the jurat the day on which it was deposed.

Per Holroyd, J. This deposition must be amended, or the commissioner, before whom it was taken, must make an affidavit as to the best of his belief stating the day it was made.—Rule refused.

5. ANON. T. T. 1813. K. B. 1 Chip. Rep. 505; S. C. 2 id. 177.

The affidavit of service in this case stated, that the tenant had deserted the premises fifteen months; that the declaration had been served on the tenant's servant-maid, on the premises; and that the nature of the declaration had been explained to her; but did not go on to state that they had searched for the tenant and did not find him, and that they did not know where he was to be met with, and that they believed he kept out of the way to avoid being served. Bayley, J., said it was not sufficient.

* After serving the declaration, an affidavit verifying that fact is made, so as to enable the plaintiff to move for judgment against the casual ejector, which is invariably granted, unless the tenant in due time enter into the common rule, &c.: see *post*, div. as to the "Appearance" and "Consent Rule."

† The affidavit is sworn before a judge or commissioner; see Adams, Ejectment, 214.

‡ Should state that the declaration was delivered, read, and explained; see Adams, Ejectment, 214.

his client a rule nisi was granted.

But an acknowledgment by the tenant on a Sunday is insufficient.

[604]

The affidavit of service by one who saw it served and explained to the tenant suffices.

An affidavit as to service should not be entitled in defendant's real name.

But must state that lessee was tenant in possession.

However, the variance in the title of a declaration [605]

and the affidavit of service being "Doe, d. of B. and A., v. B.," was holden immaterial.

The jurat of the affidavit must allege the day on which it is sworn;

And, when stating defendant's absence, a ver that lessee did not know where he was,

6. *DOE, D. LOWE, v. ROE.* E. T. 1814. K. B. 1 Chit. Rep. 505. n.; S. C. 2 id. 177. S. P. *DOE, D. BATSON, v. ROE.* M. T. 1818. K. B. 2 id. 176. S. P. *ANON.* T. T. 1813. K. B. 2 id. 186.

And that he kept out of the way to avoid service,
Motion for judgment against the casual ejector, on an affidavit that the declaration had been stuck upon the house, there being nobody in it, and the neighbours believing that the tenant in possession had absconded. The affidavit did not state the deponent's belief of the defendant's keeping out of the way to avoid the service.

And that the copy of the declaration was left, as well as affixed on the premises.
Dampier, J. It is not sufficient to entitle you to sign judgment that nobody is in the house.

7. *DOE, D. TARLAY, v. ROE.* T. T. 1819. K. B. 1 Chit. Rep. 506.
An affidavit in this case stated, that the tenant in possession had absconded to avoid arrest; and that a declaration in ejectment was nailed upon the outer door of the house. Per Bayley, J. You ought to have shown that you left the declaration there.

8. *DOE, D. SIMMONS, v. ROE.* H. T. 1819. K. B. 1 Chit. Rep. 228.
The Court in this case refused a rule for a motion for judgment against the casual ejector, it merely appearing from the affidavit that service of the declaration had been made on a woman upon the premises, who represented herself to be the wife of the tenant in possession, the deponent's belief of that fact being no where averred.

[606] insufficient, deponent not averring his belief of the fact.
9. *ANON.* H. T. 1814. K. B. 2 Chit. Rep. 187.

And where the service is not personal, the affidavit should state an acknowledgment of service.
Motion for judgment. Service of declaration had been made on the premises (in Cornwall), on the servant of the tenant in possession, who afterwards acknowledged that he had received it. However, the affidavit did not state when this acknowledgment was made; and the Court said, that for this omission it was insufficient; but, as the premises were in Cornwall, he might have a rule to show cause.

5th. *Must be annexed to the declaration.**

6th. *As to when more than one is necessary.†*

7th. *Irregularities in law remedied.‡*

(D) AS TO THE AMENDMENT OF. See also, *ante*, vol. i. tit. Amendment.

1. *PULESTON v. WARBURTON.* E. T. 1696. K. B. 5 Mod. 332; S. C. 12 Mod. 125; S. C. 1 Salk. 48; S. C. Carth. 401. S. P. *NEWEL v. BAKER.* H. T. 1736. C. P. Prac. Reg. 16. S. P. *SCRAPE v. RHODES.* T. T. 1736. C. P. Barnes, 3.

Formerly, the declaration could only be amended in point of form, and not substance, as in the demise.
In ejectment, the declaration was of Trinity term last past, on the demise of J. L. and A. his wife, for lands in B., dated 10th of April, 1697; and the ouster is laid to be afterwards, to wit, the same day. The defendant's attorney entered into the common rule to confess lease, entry, and ouster, and to try the cause; and the cause was tried accordingly last Michaelmas term, which was in the year 1696, and was half a year before the plaintiff had any title, as appeared by the declaration, whereupon the defendant's counsel moved to stay the entry of the judgment obtained. On motion to amend the declaration, and make the demise to be in the year 1696, instead of 1697, it was contended that, this being matter of substance, it could not be amended. And of that opinion were the Court, who said the Court had refused to enlarge the term in an ejectment in the case of *Hutchins v. Bassett*.

* See *Adams, Ejectment*, 213.

† If several persons be in possession of the disputed premises, and separate declarations in ejectment be served upon them, an affidavit of the service upon all annexed to the copy of one ejectment is sufficient, provided one action of ejectment only be intended; see *Adams, Ejectment*, 216. But if the ejectments are made several, so as to have separate judgments, writs of possession, &c., then separate affidavits of the several services upon the different tenants must be annexed to copies of the several declarations respectively; see 2 Sell. Prac. 100.

‡ If the affidavit be defective, a supplemental affidavit may be made and taken to the clerk of the rules, who will attend a judge thereon, and obtain an order for its amendment; see 1 N. R. 308; *Adams, Ejectment*, 216.

2. *DOE, D. RUMFORD, v. MILLER.* H. T. 1814. K. B. 1 Chit. Rep. 536. n.; { 607 }
S. C. Adams on Ejectment, MSS. 2nd edit. 199. S. P. ANON. M. T. But now a
1813. 1 Chit. Rep. 536. n. S. P. *DOE v. PILKINGTON.* 2 Burr. 2447. S. different
P. *ROE v. ELLIS.* 2 Blac. 940. rule ob-

An action of ejectment had been brought by a forfeiture; and the demise was laid on a day anterior to the time when the forfeiture was committed. A rule was obtained to show cause why the day of the demise should not be altered to a day after the forfeiture was incurred. A declaration may be amended in the day of the demise;

Per Cur. The amendment must be allowed on payment of costs.—See *DOE, d. FOXLOW, v. JEFFRIES,* MSS. cited Adams on Ejectment, 200.

3. *DOE, D. BEAUMONT, v. ARMITAGE.* H. T. 1822. K. B. 1 D. & R. 173; S. And an amendment
C. 2 Chit. Rep. 302. has been allowed by adding another count, after the

A rule having been obtained by the plaintiff to amend his declaration in an action of ejectment, by adding a new count on another demise. It appeared that three terms had elapsed, and that the roll had been made up and carried in. The Court permitted it on payment of costs. lapse of three terms and after the roll had been made up.

4. *ANON.* T. T. 1814. K. B. 1 Chit. Rep. 537. n.

A motion had been made, on a former day, for a rule nisi, to amend the declaration in ejectment (although after judgment given, and a writ of error brought,) by striking out the words "five tenements," which was granted, on payment of costs. It was objected, that the application was not in time, as there was nothing to amend by. So, after judgment and writ of error, a declaration was amended in the description of the premises by leaving out the word "tenements."

Per Cur. Let the rule be absolute on payment of costs. The writ of error must not, however, be quashed.—See *COWP.* 841; Adams on Ejectment, 2nd edition, 25.

5. *DOE, EX D. BASS, v. DOE.* H. T. 1798. K. B. 7 T. R. 469.

In a country ejectment the declaration was delivered, with notice to appear in M. T., instead of to appear in an issuable term. On application for leave to the party to amend the notice on an affidavit, stating that the lessor of the plaintiff could not bring another ejectment, on account of the statute of limitations, the Court granted the amendment. And where the notice to appear was of a wrong term, the amendment was permitted.

6. *ANON.* E. T. 1771. K. B. 1 Salk. 257.

The plaintiff had a judgment in ejectment, but was deprived of it by injunction, so that the term expired. On motion to enlarge the term, the injunction being now dissolved, the judgment was permitted.

Per Holt, C. J. We cannot alter records. Besides, the same motion was made, *East*, 3 Anne, in this Court and denied, because it could not be done without consent. Formerly, to amend by enlarging the term a consent was essential;

7. *OATES v. SHEPARD.* T. T. 1747. K. B. 2 Stra. 1271.

The term in ejectment being near expiring, it was amended, without any consent, from five to ten years. [608] But that was soon afterwards dispensed with;

8. *ROE, D. LEE v. ELLIS.* E. T. 1773. C. P. 2 Blac. 940.

The ejectment was of Hilary term, 1772; the plaintiff declared on a demise, 1st of November 1773, to hold it from the 30th of October last past, for seven years. On this record, notice was given for trial at Lent Assizes, 1772, and a special jury struck; but the mistake being discovered, the record was not entered. It was moved to amend the declaration, by striking out the word seven, and inserting the words thirty-one on the authority of *Str.* 1272. And where the term had expired several years before the ejectment was brought,

Per Cur. This is a plain mistake in the declaration, and may be amended.

9. *VICARS v. HAYDON.* T. T. 1778. K. B. *Cowp.* 841.

On a judgment in ejectment, in K. B. in Ireland, a writ of error was brought in this Court, and the judgment below affirmed. In Easter term, after the writ of error brought, and before the record was remitted, an application was made to the Court of K. B. in Ireland, to amend the record by enlarging the term, which was refused, because the record of the judgment was here, and the Court there said, "they never amended after a writ of error was brought, and the record sent over to England; but the application to amend must be in ejectment." So, in another case, even where judgment in ejectment

given in the K. B. in Ireland was affirmed in the K. B. here, the court permitted the declaration to be amended by enlarging the term, although the record had been remitted to the court of K. B. in Ireland.

[609]

But an amendment of a declaration in ejectment was in this case refused, a long time having elapsed since the first commencement of the action.

And where a party had a verdict in an action of ejectment, and the opposite side obtained an injunction to stop execution, but nothing was done in the suit for many years, during which time the term in the declaration expired; the Court

made here." Subsequently the record was remitted to Ireland, and a motion was made in this Court to amend the record, by enlarging the term in the declaration from 15 to 20 years. On showing cause, it was objected, 1st, That, as the record was sent back to Ireland, this Court could not amend. Pending an ejectment, the Court may enlarge the term; but here the cause is determined, therefore it cannot be done but by consent.

Per Cur. As the record is gone back to the Court of K. B. in Ireland, and the whole of it is supposed to be sent there, therefore they must issue the subsequent process. And, upon a writ of error from Ireland, in judgment of law, the record is removed here; but, in fact, a transcript only comes over; and when the judgment is affirmed it is sent back, and a mandatory writ issues from hence to the K. B. in Ireland, reciting the whole record and proceedings, and commanding them to do execution, by which the cause is restored to that Court; therefore, if we can do what is asked we will, for it ought to be done. It is mere matter of form; let us consider of it subsequently. *Per Cur.* We have looked into the cases, and the proper mode of relief is according to the following rule: "That, upon payment of the costs of this application to the plaintiff in error (to be taxed by the master), the defendant in error be at liberty to amend the record in this cause, by striking out the word "fifteen" in the declaration, and inserting instead thereof the word "twenty," and that a *supersedeas* issue at the expense of the defendant in error to the writ of *mittimus*, heretofore sent to the judges of the court of K. B. in Ireland; and that another writ of *mittimus* issue, at the expense of the defendant in error to the judges of the said court, inclosing the tenor of the record so amended.

10. *DOE, v. RENDALL.* T. T. 1819. K. B. 1 Chit. Rep. 535; S. C. 2 B. & A. 773.

An ejectment had been brought and judgment recovered in 1798. The term of the demise laid in the declaration had since expired. An application was made to the Court to grant a rule for enlarging the term and issuing a *scire facias*, the possession having changed, and the person who was the owner having since died. *Per Cur.* We are of opinion, that if even this declaration had been sufficiently large to answer the purpose, we ought not, under the circumstances of this case, to allow a writ of *scire facias* to issue. The application for an amendment of the declaration, by enlarging the term, is purely to the discretion of the Court. No doubt the Court will refuse the application, when they see great mischief likely to arise, from granting it. We go further; we think we ought not to grant it, unless it is shown that mischief will not arise. In such a case as this, we must have the negative proved; here the negative is not proved.

11. *BRADNEY v. HASSELDEN.* M. T. 1822. K. B. M. & S.; S. C. 1 B. & C. 121; S. C. 2 D. & R. 227.

A rule *nisi* had been obtained, calling on the plaintiffs in error, and the tenants in possession of the premises sought to be recovered by this ejectment, to show cause why the term in the declaration should not be enlarged from ten to seventy years. It appeared that, in 1763, an action of ejectment between these parties was tried; that a verdict passed against the defendant in it, subject to the opinion of the Court of C. P. in a case there reserved; that, in Trinity term, 1764, judgment was given for the lessor of the plaintiff; that error was brought in the Court of K. B., where the judgment was affirmed; that the plaintiffs in error afterwards obtained an injunction for staying execution; that upon account of the poverty of the defendants in error, they had not been able to proceed; and, consequently, that an injunction remained in force; that the defendants in error died in 1777, and that the present application was made on behalf of his heir. Cause was shown, and it was contended, that in all probability there had been some settlement between the parties prior to 1777. Reliance was on the other side placed on the authority of *Vicars v. Haydon*, (*ante*, 608.) in which the Court had made a similar amendment, where the parties had been delayed.

Per Cur. That this is an application to the discretion of the Court is quite

clear, from the case of *Doe v. Rendall*, *supra*. We must therefore be fully satisfied, that if we were to grant this application, that we should not do any injustice to the parties against whom it might operate. It is incumbent on the party applying to give us such information as will justify us in granting his request. In this case he merely states, that he is heir to the claimant, but gives no satisfactory reason for the delay that has arisen. We must, therefore, leave him to the usual course, to apply to the Lord Chancellor, who may, if he think proper, dissolve the injunction, and order the parties to consent to this amendment.—Rule discharged, with costs. See 2 Sell. Prac. 143; *Adams' Eject.* 201. 2d edit.; 3 Mod. 249.

would not amend the declaration by enlarging the term. [610]

VI. RELATIVE TO THE ANCIENT MODE OF PROCEEDING, AND WHEN IT MUST BE OBSERVED.

1. SMARTLEY v. HENDEN. H. T. 1695. K. B. 1 Salk. 255.

In ejectment for certain empty houses, a lease was sealed on the land, and a declaration delivered to the casual ejector, and judgment and execution had; yet, because they had not moved for a peremptory rule to plead, the judgment was set aside; and held that in such case there must be an affidavit of the sealing of the lease, entry, &c.

According to the ancient practice, an affidavit of the sealing of the lease was essential for judgment.†

* When the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable; for inferior courts have not the power of framing rules for confessing lease, entry, and ouster; nor the means, in such rules were entered into, of enforcing obedience to them; *Rex v. Mayor of Bristow*, 1 Keb. 690; *Sherman v. Cocke*, 1 Keb. 695; *Gilb. Eject.* 38. When also the premises are vacant and wholly deserted by the tenant, and his place of residence is unknown (*Savage v. Dent*, Stra. 1064; *Jones, d. Griffiths, v. March*, 4 T. R. 484.), the modern practice cannot be adopted. When, therefore, the party brings his action in a superior court, the possession being vacant, and the lessor's abode unknown, and when he is desirous of trying his title in a court of inferior jurisdiction, all the forms of the ancient practice must be observed; a lease must be sealed upon the premises; an ouster actually made; and the parties to the suit will be real, and not imaginary persons. The manner of proceeding in these cases is as follows:—A., the party claiming title, must enter upon the land before the essoign-day of the term of which the declaration is to be entitled, and whilst on the premises execute a lease of them to B. (any person), who may accompany him, at the same time delivering to him the possession by some one of the common modes. C. (some other person) must then enter upon the premises, and eject B. therefrom; and, having done so, must remain upon them, whilst B. delivers to him a declaration in ejectment, founded upon the demise contained in the lease, and in all respects like the declaration in the modern proceedings, except the parties to it are real, instead of fictitious persons, B. being made the plaintiff, A. the lessor, and C. the defendant. To this declaration a notice must be added, signed by B.'s attorney, and addressed to C., requiring him to appear and plead to the declaration, and informing him that, if he do not, judgment will be signed against him, by default. When the landlord, or person claiming title, does not wish to go through this ceremony himself, he may execute a power of attorney, authorising another to enter for him (2 Sell. Prac. 181.), and the proceedings are then the same as if he himself entered. But, it must be remembered, that, if it be necessary, when the ancient practice is used, to join the wife in the demise, the lease must be executed by the husband and wife, in their proper persons, because a feme covert cannot constitute an attorney; *Wilson v. Rich*, 1 Yelv. 1; *S. C.* 1 Brown 134, *Plamer v. Hockhead*, 2 Brown. 248; *S. C. Noy*, 123; *sed vide* *Hopkin's case*, Cro. Car. 165; *Gardiner v. Norman*, Cro. Jac. 617. When the ancient practice is resorted to, the suit must proceed in the name of the casual ejector; and, if the proceedings are in a superior court, no person claiming the title will be admitted to defend the action. If therefore, in such case, the right to the premises be disputed, the party who seals must, in the first instance, recover the possession; and the other party must afterwards bring a common ejectment against him, to try the title; *ex parte Beauchamp and Burt*, Barn. 177; *B. N. P.* 96; *Adams, Ejectment*, 173.

† But, in the C. P., this affidavit and motion are unnecessary; and, instead of them, a rule to plead must be given on the first day of term; and if there be no appearance and plea at the expiration of the rule, judgment may be signed; see 2 Sell. Prac. 181.

It is immaterial, as far as the forms of sealing the lease, &c., are concerned, whether the action be commenced in a superior court or inferior court; but the subsequent proceedings in inferior courts must, of course, depend upon the general practice in them in other actions. How far it may be even necessary to give the tenant in possession notice of the claimant's proceedings, in an ejectment brought in an inferior court, may appear doubtful, when it is remembered, that such notice was only requisite in the superior courts, in consequence of a rule made for that particular purpose; but it certainly is more prudent to conform to the general practice in this respect, and the notice need not to be given until

And the plaintiff's death abated the suit, he being a person actually in existence;

2. MOORE v. GOODRIGHT. E. T. 1738. K. B. 2 Stra. 899.

On a writ of *coram vobis* being brought on a judgment in ejectment, it was assigned for error, that the plaintiff in ejectment died before the day of *mise prius*. And it being in ejectment, the Court set it aside, and ordered the attorney to show cause why there should not be an attachment against him; for they said it was to defeat the proceedings instituted by the Court to try the right; and all persons know that the plaintiff is but nominal, or if a real person, yet his release is a contempt.

3. HOOPER v. DALE. M. T. 1729. K. B. 1 Stra. 531.

There being a vacant possession, a lease was sealed on the premises, and the defendant ejected the lessee, and then gave a warrant of attorney to confess judgment; on which the Court was moved to set it aside, and it was argued, that the casual ejector can in no case confess judgment. The counsel on the other side endeavoured to distinguish this from the common case, where the casual ejector is only a nominal person; but the Court said it was a trick, and set it aside.

However, though a person actually in existence, the Court would not allow him to confess judgment.*

[612] VII. RELATIVE TO THE APPEARANCE, AND JUDGMENT AGAINST CASUAL EJECTOR FOR NON-APPEARANCE.

(A) WHEN THE PARTIES APPEAR.

(a) *Who may appear.*

1st. *In general.*

DOE, D. YOUNGHUSBAND, v. ROE. H. T. 1822. C. P. 6 Moore, 480.

This was an application on the part of the lessors of the plaintiff, to oblige A. B. to come in and defend the action, on an affidavit that the party sued as heir at law, that the possession had been vacant, and that therefore a copy had been affixed on the premises; but that A. B. afterwards took possession, and now asserted his claim to the property, the subject of the action. The Court said, that a copy of the declaration should have been served on A. B. and that they could not interfere.

A person cannot be compelled to come in and defend, until served with a copy of the declaration.

2nd. *In particular.*

1. *Cestui que trust.*

LOVELOCK, D. NORRIS, v. DANCATER. T. T. 1790. K. B. 3 T. R. 783.

The *cestui que trust* moved for leave to defend an ejectment instead of the tenant. It was opposed, on the ground that he had never been in possession and could not be considered as landlords under the 11 Geo. 2. c. 19.

A *cestui que trust* not having been in possession, will not be permitted to defend an ejectment.

Per Cur. The heir at law, or remainder-man, are within the statute; but, we cannot extend its provisions to this case, because here the very question in dispute is between the adverse party and himself, whether he is entitled to be landlord or not.

2. *Devisee.*

LOVELOCK, D. NORRIS, v. DANCATER. M. T. 1791. K. B. 4 T. R. 122.

A rule had been obtained to permit a devisee in trust to defend as landlord, under the 11 Geo. 2, c. 19. s. 13. which it was moved should be discharged, because he had not been in possession. Upon the Court's asking whether the after the entry and execution of the lease; 1 Lill. Pr. Reg. 675. An ejectment can be removed from an inferior to a superior court by *habeas corpus* or *certiorari*; see 1 B. & C. 253; S. C. 2 D. & R. 407; Highmore v. Barlow, Barn. 421; Allen v. Foreman, 1 Sid. 318. When an ejectment is removed from an inferior to a superior court, the tenant in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court; Gilb. Eject. 37. When the lands lie partly within and partly without the jurisdiction of the inferior court, the defendant cannot plead above the jurisdiction of such inferior court, because the demise is transitory, and may be tried any where; see Hall v. Hughs. 2 Keb. 69; Adams, Ejectment, 117.

A devisee who has not been in possession, was permitted

* But it was said that, if the plaintiff released to one of the tenants in possession, who had been made defendant, such release would be a good bar; because the plaintiff could not recover against his own release, since he was the plaintiff upon the record, though the Courts considered such a release as a contempt; and it does not appear that a plea of this nature ever occurred in practice; see 2 Brown, 128; Salk. 260; 4 M. & S. 300.

lessor would not consent to try it on an issue *devisavit vel non?* and, on his refusal, the rule to set aside the original rule was discharged.

3. *Ecclesiastical persons.*

MARTIN v DAVIS. M. T. 1764. K. B. 2 Stra. 914.

In an action of ejectment, the Court denied to let the parson of Hempstead defend only for a right to enter and perform divine service, notwithstanding the case in Salk. 256, saying it had been often denied since.

4. *The heir at law.**

5. *Landlord.* As to the landlord's right to appear in general, and the tenant's liability for concealing the ejectment. See post, 616. div. viii. Relative to the Landlord's Appearance, and the Tenant's not giving the Landlord Notice of Ejectment.

6. *Lord by escheat.*

FAIRCLAIM, D. FOWLER, v. SHAMTITLE. H. T. 1728. K. B. 3 Burr. 1290; S. C. 1 Blac. 357.

It was moved, on behalf of the plaintiff, to discharge a rule, whereby it had been ordered that Earl Gower and Gifford, landlords of the tenant in possession of the premises in question, should be joined and made defendants with the tenant, if he shall appear: and if he should not appear, that they might appear for themselves. The objection to the rule was, "That Gower and Gifford had never been in possession;" and that the act of parliament of 11 G. 2. c. 19. s. 13. was made for the security of landlords who had been in possession. Here, Gower and Gifford claim by escheat, on the death of Elizabeth Levisa; and the plaintiffs claimed as heir at law to her; but neither had been in possession. On showing cause against the rule, it was admitted the lessors of the plaintiff claimed as heirs: and Gower and Gifford, by escheat of a copyhold, *pro defectu hæredis*, not for a forfeiture for want of an heir's coming in; and that, therefore, they only desired to have the cause tried. And it was argued that a lord of a manor has such a seisin at law of an escheated copyhold, that the occupier is his tenant at will, and the lord may distrain for the rent; and though, perhaps, the occupier may not be liable to the penalty of the treble rent, yet the lord may avow upon him for the single rent. That the lords, by escheat, claim upon the same foot as if they were heirs to the deceased tenant: and the heir might be admitted to be made defendant, though he had never received rent. The Court recommended, and the counsel on both sides consented to, a fair trial of the lord's title to claim by escheat: and the method was at length agreed upon, viz. that the lord (who could never come into possession without an ejectment to be brought by him) should immediately bring his ejectment against the present lessors of the plaintiff; and that the said lessors of the present plaintiff (who claimed as heirs of the deceased) should be admitted to defend, either alone, or together with the tenant in possession. Subsequently, Lord Mansfield, C. J., declared, that he was clear that this method of "putting the person, claiming to be lord by escheat, to bring his ejectment," was the proper way of trying the right upon the merits. If there was really no heir, then the lord stood in the place of the deceased; but if there was any heir whosoever, the lord's claim was at an end.

7. *Mortgagee.*

DOE, D. TILYARD, v. COOPER. T. T. 1800. K. B. 8 T. R. 645.

On motion that the mortgagee might be made defendant with the mortgagee, it was objected to, on the ground that the application was not that the mortgagee should defend *instead of*, but was to defend *with*, and therefore unusual and irregular. But the Court overruled the objection.

8. *Remainder-man.†*

9. *Wife alone when permitted.*

FENWICK'S CASE. M. T. 1701. K. B. 1 Salk. 257.

A motion was made to make the lessor of the plaintiff's wife a defendant in

* The immediate heir to the person last seised will be permitted to appear, though he has never been in possession; see 3 T. R. 783.

† A remainder-man claiming under the person last seised will be admitted to defend, though he has never been in possession; see 8 T. R. 783.

ted to defend as landlord.

A person claiming a right to enter, and perform divine service, cannot be admitted defendant.

One claiming as lord by escheat, may be admitted defendant in an ejectment brought against the tenant in possession, by the lessor of one claiming as heir at law.

[614]

A mortgagee was permitted to defend an ejectment with the mortgagee.

A wife has been permitted to

defend where the plaintiff's title arose from a pretended in term marriage.

The appearance of tenants in possession to country ejectments, served before the assign-day of any Michaelmas or Easter

mas or East [615] term, must be within four days after the end of such terms respectively. It seems that if the defendant in ejectment does not appear,† and plaintiff is in consequence non-suited, that judgment may be signed on the first day of the next term, and that a writ of possession may be sued out on the same day.

ejectment, the plaintiff's title being by a pretended intermarriage, which was controverted. *Holt, C. J.* To make the landlord a defendant in ejectment is of right; for otherwise she might lose her possession by combination between the plaintiff and tenant in possession; and the Court inclined to grant the motion, because there could be no inconvenience, and it would make the verdict more considerable.

(b) *Manner of appearance.*

1st. *Time allowed for.*

REG. GEN. E. T. 1821. K. B. 4 B. & A. 539; Same rule, E. T. 1821. C. P. 2 B. & B. 705. 5 Moore, 637; Same rule, Ex. 8 Price, 504; 9 ib. 299. T. R. 9 Price, 299.

In all country ejectments, which hereafter shall be served before the assign-day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be without four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following.

2nd. *Of what term to be entered.**

(B) WHEN THE PARTIES DO NOT APPEAR, AND OF THE JUDGMENT AGAINST CASUAL EJECTOR FOR NON-APPEARANCE.

DOE, D. DAVIS, v. WILLIAMS. M. T. 1822. MSS.; S. C. 1 B. & C. 118; S. C. 2 D. & R. 229.

Cause was shown against a rule nisi, for setting aside the writ of possession, executed in this cause for two reasons; first, because the *postea* was not produced when the judgment was signed; and, second, because the writ was taken out before the return of the *postea* to the court. It appeared, that this action of ejectment, was brought to recover premises in Cardigaushire, and that at the last assizes for the county of Hertford the defendant suffered judgment to go by default, by not appearing to confess lease, entry, and ouster; that the *postea* remained in the hands of the associate until the 12th day of November; that on the first day of the term the lessors of the plaintiff took out the writ; that on the 12th day of November, by an arrangement to prevent the unpleasantness of possession being taken by the sheriff's officer, the premises were given up by the defendant's agents to the lessors of the plaintiff. It was however contended, that there was no irregularity; for it was not the usual practice of the court to produce the *postea* at the time of signing judgment; and although the writ was taken out on the 6th of November, yet it was not executed until the 12th, at which time there could be no doubt that the plaintiff was entitled to possession. And moreover, if there was any irregularity, it had been waived by the defendant's agent quietly giving up possession, and he relied on the case of *Doe, d. Lord Palmerston, v. Copeland*, 2 T. R. 778. In support of the rule nisi it was answered, that the irregularity was not waived, because the arrangement was made in ignorance of its existence, and merely on the ground of delicacy; that there were several cases to show that the *postea* ought to be produced at the time of signing judgment; *Sir Hugh Middleton's case*, 1 Keb. Rep. 246; *Stanford v. Chamberlaine*, 5 Mod. 265; *Turner v. Barnsby*, 1 Salk. 259; and that, inasmuch as it appeared that the associate actually had the *postea*, the Court would not presume that it was with them in bank, and that if this rule of law were correct, a defendant would be

* The appearance shall be entered of the term mentioned in the notice, unless it be a country cause, and the notice be to appear in a non-issuable term, then the appearance must be of the next issuable term; see *Barn*, 250.

† Where there is not any appearance (which may be known by searching the judges' books in the K. B., in the prothonotary's plea book in the C. P.) the plaintiff must draw up a rule for judgment with the clerk of the rules in the former, and the secondary in the latter court, and then make an *incipitur* of the declaration, and also on a roll of that term: these he must carry to the clerk of the judgments in the K. B. and to the prothonotary in the C. P., who, on seeing the rule for judgment will sign it accordingly. But, in the C. P., the plaintiff must take out a warrant of attorney for the defendant, and carry it with the other papers to the prothonotary when he signs the judgment; see *Run. Ejectment*, 450.

If judgment be signed against the casual ejector, and it be made appear that no declaration was regularly served, the Court will set it aside; *Run. Ejectment*, 450.

turned out of possession on the very day perhaps in which the Court had granted him a new trial.

Per Cur. This application is necessarily made to the discretion of the court, after the defendant had himself quietly given up possession of the premises, which clearly showed that he did not intend to make any motion in this court within the first four days of the term. It is unnecessary to determine whether the writ might or might not be issued on the first day of the term; but it may be observed, that this case is materially different from those which require the rule for judgment to be drawn up after the coming in of the *postea*, the consent rule is in its nature very similar to the rule for judgment, and perhaps the practice of this Court might in this respect be assimilated to that of the Court of Common Pleas. In the case of *Stanford v. Chamberlaine*, they were bound to take a rule for judgment, as the plaintiff had a verdict at the trial; in *Doe v. Copeland*, the Court did not set aside the writ of possession, but directed the Master to inquire what injury had been sustained by issuing it too soon; there is nothing in the objection that the *postea* was not in court. Every rule for judgment is made on the presumption that it is in court; they therefore think that the justice of this case would merely require, that the Master should be ordered to ascertain what damages the defendant has received by the execution of the writ a day before it ought to have been executed. But in this case such inquiry is unnecessary; for, by permission, the possession was given, and consequently no harm could have been done. The rule must, therefore, be discharged.—Rule discharged with costs.

VIII. RELATIVE TO THE LANDLORD'S APPEARANCE AND THE TENANT'S NOT GIVING THE LANDLORD NOTICE OF THE EJECTMENT.

1. *GOODRIGHT V. HART.* E. T. 1728. K. B. 2 Stra. 830.

The defendant, as daughter and heir of the late Admiral Hosier, brought an ejectment, and recovered, and was put in possession: the other side brought an ejectment, and Hart and his wife obtained a rule to be made defendants, with the tenants in possession, and entered their appearance; but the tenants refused to appear to make any defence; on which judgment was signed against the casual ejector. On motion to set it aside, the Court refused to set aside the judgment; saying, that the rule was only that the landlord should be made defendant with the tenants in possession; and therefore, if they would not stand the suit the landlord could not be let in.

2. *ANON.* M. T. 1697. K. B. 12 Mod. 211.

If notice in ejectment be given to an under tenant, and he does not acquaint his landlord therewith, but suffers judgment to go against him, the Court, on motion, will not suffer the execution to be taken out till the right is tried.

3. *DOE, D. SCHOFIELD, V. ALEXANDER.* H. T. 1814. K. B. 3 Campb. 516. S. | 617 |

P. FENN, D. PHILLIPS, V. COOKE. H. T. 1814. K. B. 3 Camp. 512. S.

P. JONES V. EDWARDS. M. T. 1745. K. B. 2 Stra. 1241.

In ejectment, the lessors of the plaintiff having made out their title, proved that the ejectment was served upon a person of the name of A. B., who was then in possession of the premises; and produced the common rule of Court whereby the defendant was allowed to come in to defend as landlady. It was contended, that it must be proved that A. B. held the premises as her tenant; Smith, d. Taylor, v. Mann, 1 Wils. 220.

Per Lord Ellenborough, C. J. All that is necessary is to prove the title of the premises for which the defendant comes in to defend as landlady.

* Cap. 19. s. 13. by which it is provided, that the landlord may make himself a defendant in ejectment, though the tenant refuses to appear; and though judgment is signed against the casual ejector, the Court shall order a stay of execution, till they make further order thereon.

† By 11 Geo. 2. c. 19. s. 12. it is enacted, that every tenant, to whom any declaration in ejectment shall be delivered shall forthwith give notice thereof to the landlord, &c. under the penalty of forfeiting the value of three years' improved rent.

Before 11 Geo. 2.* no means existed by which the tenant could be compelled to appear, Or give the landlord notice of the ejectment.

And now where a party defends as landlord, it must be shown that the declaration was served on

the tenant in possession." and that is sufficiently done by proving the service of the ejectment upon the tenant in possession. Here the lessors of the plaintiff have shown what premises they go for in this action, by proving the service of the ejectment upon A. B. while in possession of them, and the defendant is concluded by having come in and claimed to defend for them as landlady.

But it is not necessary to produce the land lord's rule to show that defendant comes in as land lord.

4. DOE, D. GILES, V. BARWICK. M. T. 1816. K. B. 5 M. & S. 393.

Action of ejectment. Service of declaration was proved on three tenants in possession; but neither the landlord's or tenant's rule was produced, nor was there any evidence to show the defendant to be landlord. It was objected, that the landlord's rule ought to have been produced, in order to connect the defendant with the premises; but the Court said, that service of the declaration on the tenants in possession being proved, it followed that the defendant must come in as landlord.

5. DOE, D. KNIGHT, V. SMYTHE. H. T. 1815. K. B. 4 M. & S. 347.

A third person cannot claim to defend as landlord to an action of ejectment, brought by a person under whom the tenant in possession held. [618] And the landlord will be let in to try his right on the merits after judgment against a casual ejector, where the tenant has omitted to give him notice.

6. DOE, D. INGRAM, V. ROE. M. T. 1822. Ex. 11 Price, 507.

A rule was obtained to show cause why judgment in ejectment against the casual ejector should not be set aside, after judgment executed, and possession delivered up to the lessor of the plaintiff, on the ground that there had been no notice given to the landlord, by the tenant in possession, of the proceedings, and consequently, no trial on the merits. The Court made the rule absolute, on the terms of the landlord paying costs to the lessor of the plaintiff, and the possession to be in the mean time retained by the latter.

7. GOODTITLE V. BADTITLE. E. T. 1813. C. P. 4 Taunt. 820.

Provided there be a collusion and sale, and transfer of part of the premises.

This was an application to let in a landlord to defend, from whom his tenants had concealed an ejectment. The plaintiff had obtained judgment and possession in the prior undefended ejectment without collusion, and had sold part of the premises and transferred the possession.

Per Cur. We must discharge the rule: here the case is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the plaintiff? He has not been to blame.

8. BUCKLEY V. BUCKLEY. E. T. 1787. K. B. 1 T. R. 647.

The 12 s. of the 11 Geo. 2. c. 19. extends only to those cases in which the ejectments are inconsistent with the landlord's title.

To support an action on the 11th Geo. 2. c. 19. for secreting an ejectment, it was proved that the action was brought for the purpose of compelling an attornment, in consequence of which the defendant actually attorned to the mortgagee; he gave no notice to his landlord the plaintiff, either of the ejectment or of the attornment, for omitting the former of which this action was brought. The judge who tried the cause, being of opinion it was not within the statute, directed the plaintiff to be called. On motion to set the nonsuit aside, the Court refused the rule, saying the statute only extended to cases where ejectments were brought, which were inconsistent with the landlord's title, and that the act permitted the tenant to attorn to the mortgagee.

9. CROCKER V. FOTHERGILL. T. T. 1819. K. B. 2 B. & A. 652.

And the for seizure of treble value of the premises for not giving There had been in this case a demise by lease of certain lands, together with the mines under them; with liberty to dig for ore in other mines, under the surface of other lands not demised. The tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all; but the she-

* Or that the landlord was in receipt of rents and profits; see 3 Campb. 512.

riff, in executing the writ of possession by the concurrence of the tenant, delivering his land vered possession of the premises demised to the tenant, and also of those mines of an ejectment does in which he had liberty to dig. At the trial it was insisted that the declaration not confine in ejectment only applied to the premises specifically demised by the lease, and not to any advantage under the license to dig contained in it; and therefore the damages to the covered in that ejectment: still that mines in which he had a mere licence to dig could not be so recovered, and that, therefore, the plaintiffs were not entitled in this action to any compensation for any mines under any part of the premises mentioned lands not specifically demised. The learned judge said, that, as the benefit [619] which the tenant took under the lease was the mine under the surface not demised, as well as that which was demised; and as that constituted a part of a reservation, what the plaintiff had to carry to market, to make the subject of a reservation in the shape of an improved rack-rent from a tenant, at the expiration of the lease; and as that constituted part of the benefit of which the defendant's conduct was calculated to deprive the plaintiff, by withholding notice of the service of the declaration in ejectment, it ought, therefore, to be taken into consideration in estimating the penalty; and that the jury ought not to confine their verdict to the value of the land alone, which was actually demised, but ought to extend it over the whole of the property which the defendant ought to have restored to the plaintiffs, and which they might have had the opportunity of letting to advantage. The jury found a verdict accordingly, which the Court now refused to disturb.

IX. RELATIVE TO THE CONSENT RULE.*

1. GOODRIGHT, D. BALCH, v. RICH. T. T. 1797. K. B. 7 T. R. 327. S. P.
- FENN, D. BLANCHARD, v. WOOD. 1 B. & P. 573.

The lessor of the plaintiff proved his title to lands in the declaration mentioned. The defendants showed that they were not, nor ever had been, in possession of any part of the premises in question. The plaintiff had a verdict subject to the opinion of the court on the question, whether the defendants after entering into the conditional rule, could be permitted to prove that they neither were, or had been, in possession of the premises which the plaintiff, by the evidence had entitled himself to.

Per Cur. Two rules have been made by the two Courts, differing, indeed, in words, and, as the plaintiff now contends, differing also in substance. In the C. P. the defendant enters into the consent rule as to all the lands in his possession: then, on that rule, it is necessary for the plaintiff to prove the defendant in possession of the land that he claims. But, it is said that the meaning of the rule of this court is different. I should be extremely sorry to find, that in a fictitious proceeding, instituted for the more easy attaining of justice, different rules were to obtain in the different courts. If we were bound to decide, in this case, in favour of the plaintiff, it would be necessary to alter the rule of our court immediately. This point, however, came under the consideration of the court, in *Smith v. Man* (1 Wils. 220), where it was holden that the plaintiff must prove the defendant in possession; and I think that that case was properly decided.—Judgment of nonsuit.

* If the tenant appears, then he enters into the consent rule, the substance of which is as follows:—1st. He consents to be made defendant instead of the casual ejector. 2nd. To appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail. 3rd. To receive a declaration, and plead not guilty. 4th. At the trial of the issue, to confess lease, entry, and ouster, and insist upon title only. To this rule are to be added the two following conditions: 1st. If, at the trial, the defendant shall not confess lease, entry, and ouster, whereby plaintiff shall not be able to prosecute his suit, defendant shall pay to the plaintiff the costs of non pros and judgment shall be entered against the casual ejector by default. 2nd. If a verdict shall be given for defendant, or plaintiff shall not prosecute his suit for any other cause than the non confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; see *Adams, Ejectment*, 232.

† In the court of C. P., the defendant consents to confess lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration as are in the possession of the defendant, or his tenants; but, in the common consent rule of the K. B., the defendant consents to confess lease, entry, and ouster, generally; see *Adams, Ejectment*, 233.

And bound 2. REG. GEN. M. T. 1820. K. B. 4 B. & A. 196; Same rule, 2 Chit. Rep. 375; Same rule, H. T. 1821. C. P. 2 B. & P. 470; 5 Moore, 310; Same rule, E. T. 1821. Ex. 9 Price, 299; Same rule, 2 Chit. Rep. 386.

In every action of ejectment the defendant shall specify, in the consent rule, for what premises he intends to defend, and shall consent, in such a rule, to confess, upon the trial, that the defendant, (if he defends as tenant; or, in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises, and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his action against the said defendant, then no costs shall be allowed for not further prosecuting the same; but the said defendants shall pay costs to the plaintiff, in that case to be taxed.

3. DOE, D. SPENCER, v. READ. H. T. 1819. C. P. 3 Moore. 96.

A consent rule was objected to, being entitled on the several demises of Spencer and others v. Roe. This, it was said, was insufficient, as the christian and surnames of each of the parties to the rule should have been set out at length.

See per Cur. John Doe is not a nominal but a real plaintiff, and it is not of the plain necessary to particularize the names of the lessors.

X. RELATIVE TO BAIL.

(A) COMMON.

BOUCHIER v. FRIEND. M. T. 1681. K. B. 2 Show. 260.

In case of judgment against the casual ejector, there ought to be a *latitat* sued out against, and common bail filed for the casual ejector, for the court set aside a judgment in this case for want of it.

(B) SPECIAL.

1. DOE, D. MARQUIS OF ANGLESEA, v. BROWN. E. T. 1823. K. B. 2 D. & R. 688.

In this case a question arose upon the 1 Geo. 4. c. 87. as to the time within which the undertaking and security required to be given by that act shall be given. The act stated "that it shall be lawful for the Court, upon cause shown, or upon affidavit of the service of the rule, in case no cause shall be shown, to make the same absolute, and to order such tenant, within a time to be fixed, to give such undertakings, &c.

Per Cur. The proper construction of this part of the statute clearly is, that the Court shall fix a time for the recognizance to be entered into, at the time when they grant the rule for that purpose. In this respect, the rule in this case is defective, and cannot be acted upon in its present form; but as the mode of proceeding might be considered doubtful, we will now amend the rule by fixing the time.

2. DOE, D. PHILLIPS, v. REED. E. T. 1822. K. B. 5 B. & A. 766; S. C. 1 D. & R. 433.

A rule had been obtained, calling on the tenant in possession to show cause why he should not, *inter alia*, according to 1 Geo. 4. c. 87. enter into a recognizance, by himself and two sureties, in a reasonable sum, conditioned to pay the costs and damages which might be recovered by the plaintiff in the action.

Per Cur. It appears to us to be sufficient that the amount of the security should be specified when the rule is made absolute, as the Court will then be

* But the bail need not be filed until after the rule for judgment is drawn up; see Gilb. Ejectment, 21. The reason for this form seems to be, that there is no cause in court against the casual ejector before bail is filed, and therefore, nothing upon which the judgment can be grounded; see Gilb. Ejectment, 22.

† Cap. 87, which provides, that tenants holding over after the determination of their tenancy, by notice or otherwise, are now required to find bail for their appearance to the action (if ordered by the Court), to enter into a rule to give judgment of the term preceding the trial, and to enter into recognizances with sureties to pay the costs and damages recovered by the plaintiff.

enabled to judge what may be a reasonable sum to be fixed, upon hearing all the circumstances of the case. Tenant after peremptory order to find recognizances, or ordered to appear in the next succeeding term, and no cause being shown judgment entered for plaintiff. [622]

3. *DOE, D. SAMSON, v. ROE*, T. T. 1821. C. P. 6 Moore, 54.

This was a proceeding in ejectment, under the statute 1 Geo. 4. c. 87. s. 1. The Court, on making a rule absolute (no cause being shown) for the defendants, undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action, ordered the tenant to appear in the next succeeding term, to find such bail as were specified in a former rule, and on no cause being shown to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute.

(C) IN ERROR. See *post*, tit. Error, Bail in.

XI. RELATIVE TO CONSOLIDATING ACTIONS.

ANON. 2 Sellen Prac. 144. *S. P. SMITH v. CRABB*. H. T. 14 Geo. 2. 2 Stra. 1149.

On a rule to show cause why the proceedings in thirty-seven actions of ejectment, brought against the occupiers of so many houses in Sackville-street, should not be staid, and abide the event of a special verdict, in another action upon the same title, Lord Kenyon, C. J. said, it was a scandalous proceeding, that all the causes depended on the same title, and ought to be tried by the same record.—Rule absolute. See Barn. 176; 7 T. R. 477. Where several ejectments are brought depending on the same title, the court will consolidate.

XII. RELATIVE TO THE PLEAS.

(A) GENERAL ISSUE.*

(B) OF SPECIAL PLEAS.

1. *DOE, D. HAMILTON, v. ROBINSON*. M. T. 1739. K. B. 2 Stra. 1120.

Several declarations in ejectment were delivered before the essoign-day of Easter term; and in Trinity term the defendants appeared, and moved for leave to plead to the jurisdiction, that the lands lay in the county palatine of Chester. And on showing cause, it was objected, that they came too late. By permission of the Court, defendant may plead to its jurisdiction. †

Per Cur. Though in ordinary cases, the defendant must plead within the first four days; yet we all know that in a country cause the tenants cannot be compelled to appear till four days after Trinity term. As, therefore, they have come in voluntary before they could be obliged, it is hard to say they are out of time. And therefore the rule for pleading to the jurisdiction was made absolute.

2. *DOE, D. BYNE, v. BREWER*. T. T. 1815. K. B. 4 M. & S. 300.

Action of ejectment. Plea of release of the action by the lessor of the premises. Demurrer and joinder. And plea of release by the real parties is good. [623]

Per Cur. Judgment must be given for the plaintiff; looking to the record, we must consider those as real parties to the action who are parties upon record, and the real parties alone are qualified to release the action. For this purpose, the action must be taken with all its consequences, as if it were really pending between these parties. For other purposes, indeed, we treat it as it really is, a fictitious action, but as matter upon the record, it must be taken as if really between the parties to it.

(C) SIGNING JUDGMENT FOR WANT OF. ‡

XIII. RELATIVE TO THE REPLICATION. §

* Not guilty is the general issue to this action; and it seldom happens, by reason of the consent rule, that the defendant can plead any other plea; see Selw. N. P. 714; Peters. Sup. Blac. 153; Adams, Ejectment, 241.

† As ancient demesne; see ante, vol. i. from p. 612. to 617. So, accord and satisfaction is a good plea; see 9 Co. 77.

‡ The plea is usually left with the consent rule; and if it be not, the plaintiff, after giving a rule to plead, may enter judgment for want of a plea; see Adams, Ejectment, 241.

§ When the party appearing has entered into the consent rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the consent rule; and the plain-

XIV. RELATIVE TO THE ISSUE.

BASS v. BRADFORD. M. T. 1725. K. B. 2 Ld. Raym. 1411.

The issue* must agree with the declaration. But if there be a difference in the defendant's name, the court will set it right; In ejectment, the demise in the declaration against the casual ejector, and afterwards delivered to the tenant in possession, was laid of the second of June last, to commence from Lady Day before; and after the tenant in possession had entered into the common rule, in the declaration in the issue delivered to the defendant, the demise was laid to be of the 2d of August last, the title of the lessor of the plaintiff being on a breach of the condition for non-payment of rent due at Midsummer last. It was moved for the defendant, that the issue might be made according to the declaration delivered to the tenant in possession, because the plaintiff ought not to recover on a title that accrued subsequent to the delivery of the first declaration; the plaintiff insisted, that the first declaration was only in nature of a notice, and therefore the second declaration might vary from the first as to the demise.

Per Cur. By the course of this Court there can be no alteration in the declaration in the issue from the first declaration delivered, only in the defendant's name. And a rule was made, that the issue should be made according to the declaration delivered against the casual ejector.

XV. RELATIVE TO THE EVIDENCE.

(A) IN GENERAL.

[624]

(a) *Of defendant's possession.*†

(b) *Of title.*†

1. **DOE, D. CLARKE, v. GRANT.** E. T. 1810. K. B. 12 East, 220.

This was an action of ejectment, brought on the joint demise of several trustees of a charity. The defendant, it was shown, had paid one entire rent to the common clerk of the trustees. It was adduced in evidence, that they were appointed at different times, in order to show that they were tenants in common, and thereby negative the inference that would otherwise arise from the payment of the rent. But Lord Ellenborough, C. J., said, that in favour of the lessors of the plaintiff, whose tenant, the defendant, held out against them, his act in paying the one entire rent to their clerk should enure in the most beneficial way for them in support of their title, as brought forward by themselves, unless the defendant had expressly proved them to be entitled in a different manner.—Rule refused.

2. **DOE, D. WOOD, v. MORRIS.** E. T. 1810. K. B. 12 East, 237.

In ejectment by landlord against tenant, the landlord proved payment of rent, and half a year's notice to quit, but on the cross examination of the plaintiff's witness, he was asked whether there was not an agreement in writing relative to the holding of these lands; to which he answered, that an agreement in writing relative to these lands was produced at the last time of this ejectment (this being the second trial) but he did not know the contents of it, and then another witness was called, who proved that he had seen the same paper in the hands of Sir M. Wood's attorney, on the same morning (i. e. of this trial,) whereupon it was objected on the part of the defendant that no parol evidence of the tenancy could be given, when it appeared that there was an agreement tiff may be non-prossed; but as the plaintiff is only a fictitious person, the defendant will not be entitled to costs; see *Blac. 763*.

* The record and issue are made up with memorandums, if the proceedings are by bill; and without any memorandum, if by original, as in other actions; see Adams, Ejectment, 244.

† The defendant must be shown to be in possession of the premises which the plaintiff seeks to recover; hence, where a defendant, on being served with a declaration, assented to the character of tenant, it was held sufficient evidence of possession; see 2 B. & A. 371. The common consent rule is evidence of possession; see 2 B. & A. 196; 2 B. & B. 70; 2 Chit. Rep. 275. And, in *Fenn, d. Blanchard, v. Wood*, M. T. 1796, C. P. 1 B. & P. 573. S. P. 4 *Goodright v. Rich*, 7 T. R. 327, it was held, if a declaration in ejectment be served upon a tenant, and his landlord be admitted to defend, the plaintiff can only recover such premises as the tenant is proved to be in possession of.

† The titled proved must be consistent with that stated in the declaration : in other words the plaintiff must show that he has a legal and valid right to the premises in question ; see 6 Rep. 14. b. ; Co. Lit. 45.

in writing concerning it, and it did not appear that the landlord had any right ing, unless it also appears that the agreement was between the parties, as landlord and tenant, and that it continued in force to the very time to which the parol evidence applies.

Lord Ellenborough, C. J. If there were any writing relative to this holding in the possession of the landlord, the defendant ought to have given him a regular notice to produce it, otherwise in this collateral way he would get the whole benefit of it, without giving such notice; when, if notice had been given and the paper were produced, it might not support the objection, how can we say the plaintiff ought to have been nonsuited, for want of giving the best evidence of tenancy, unless it appeared that there was other and better evidence of it in agreement in writing between the landlord and his tenant, which the landlord kept back; enough at least ought to appear, to show that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received, but it did not appear that it was an agreement between these parties or that it was an existing agreement at this time; it might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question.

3. DOE, D. GRIFFIN V. MASON. E. T. 1811. K. B. 3 Campb 7.

In ejectment for certain premises assigned by the defendant to the lessor of the plaintiff, to secure the payment of an annuity. It was contended that the lessor of the plaintiff was bound to prove that the annuity had been enrolled, as directed by the 17 Geo. 3. c. 26.

Per Lord Ellenborough, C. J. I shall presume it to be valid until the contrary appears.

(c) *Of the entry.** (d) *Of the premises.*

DOE, D. TOLLET, V. SALTER. M. T. 1810. K. B. 13 East, 9.

This was an action of ejectment. The premises were laid to be in Farnham, but it was shown that they were situated in Farnham Royal. This, it was contended was a fatal variance. But the judge before whom the trial took place said, that unless the defendant could prove that there were two Farnhams, he should direct a verdict for the plaintiff. This was recorded, and a rule to set it aside was now refused.

(e) *Of ouster.†*

(B) IN PARTICULAR.

(a) *Assignee of bankrupt.* See ante, vol. iii. p. 836.

(b) *Conusee of statute merchant.* § (c) *Conusee of statute staple.* ||

* Proof of an actual entry is only necessary where a fine has been levied with proclamations; see 2 Stra. 1086: 13 East, 489; and is not necessary to avoid a fine at common law, without proclamations; see 2 Wils. 45; Willes, 177; nor is it necessary to avoid a fine with proclamations, unless the proclamations have all been made at the time of the commencement of the action; see 9 East. 17; nor will it be necessary, on a clause of re-entry, for non-payment of rent; see Doug. 497; or for the breach of a condition; see 3 Burr. 1897; 1 East, 564; 3 M. & S. 275.

† The description and situation of the premises ought to be proved to be consistent with that stated in the declaration; see 1 Phil. Ev. 230.

‡ When an ejectment is brought by one joint-tenant, parcener, or tenant in common, against his companion, the lessor may be called upon to produce the consent rule; and if it appear that a special one has been granted, that the defendant shall confess lease and entry only, the lessor must prove an actual ouster by his co-tenant; see Adams, Ejectment, 53. But if the consent rule be in the common form, it will be sufficient evidence of an ouster; see 1 Campb. 173.

§ Must produce the recognizance or an examined copy of it; see Bull. N. P. 104; Salk. 583; an examined copy of the writ of capias si laicus, and return; see 13 Ed. 1. s. 3; and also an examined copy of the writ and return of the extent and liberari feci. If the action be not against the conusor, but against one who had possession previous to the acknowledgment, the plaintiff must also prove the conusor's title, or if he claims under the conusor that his interest is determined, and the identity of the parties; see 8 T. R. 2.

|| The evidence consists in the first place of the bond of the conusor, to be proved in the regular manner; or in case of its loss or damage, a true copy from the roll, in the custody of the clerk of recognizances, or his deputy, will have precisely the same effect as if the original recognizance were produced; see 8 Geo. 1. c. 25. s. 2. After proof of the recognizance, the writ of liberate is to be proved; but the proof of the writ of extent seems not

Where premises were assigned to secure an annuity, in ejectment, it will be presumed that the annuity deeds were properly enrolled.

There is no variance in ejectment in describing premises as situated, for in [626] stance, in Farnham, and they prove to be in Farnham Royal, there not being two Farnhams.

(d) *By Copyholder.* See *ante*, tit. Copyhold.

(e) *By devisee.* See *ante*, tit. Devise.

(f) *By ecclesiastical persons.** (g) *Elegit, tenant by.*† (h) *Executor and administrator.*

[627]
An admission by defendant in an answer in Chance ry. "that he believed that the testator was possessed of the leasehold, &c." is evidence that the testator had an interest sufficient to enable the executor to maintain ejectment.‡

DOE, D. DIGBY, v. STEEL. M. T. 1811. K. B. 3 Campb. 114.

In ejectment by an executor to prove his title, he put in the defendant's answer to a bill in equity filed against him for a discovery. In this it was stated, "that he believed that the testator was possessed of the leasehold premises in the bill mentioned." On objection,

Lord Ellenborough, C. J., was of opinion that, as against the defendant, who had admitted that he believed the testator to have been in his life-time possessed of the leasehold premises in question, he would not require the plaintiff to go further.

(i) *By guardian.*§ (j) *By heir.*|| (k) *By landlord.***

to be necessary, as this is recited in the liberate. If the action be against a third person in possession of the lands, not against the debtor himself, other evidence will also be required, as in the case of an ejectment against a third person by the donee of a statute merchant; see Phill. Ev. 204.

* Where the ejectment is brought for a rectory, the plaintiff ought to prove his lessor was admitted, instituted, and inducted; and formerly it was holden necessary for him to show also that he had read and subscribed to the 39 articles, and declared his assent to all things contained in the book of Common Prayer; but this, however, is no longer required, unless some ground be laid by the defendant to prove that he has not complied with those requisites; see 3 Wils. 355. Title in the patron need not be proved; for institution and induction, upon the presentation of a stranger, is sufficient to bar him who has right in the ejectment, and to put the rightful patron to his quare impedit; see Bull. N. P. 105.

† Must either produce in evidence an examined copy of the judgment of the writ of eligit taken out upon it, and the inquisition and return thereupon, or an examined copy of the judgment roll, containing the award of eligit, and return of the inquisition; see 2 M. & S. 565; 2 Phill. Ev. 202.

‡ The executor proves his title by the production of the probate; see 6 T. R. 205; Bull. N. P. 246. An administrator in strictness ought to produce the letters of administration under the seal of the Ecclesiastical Court; but the original book of acts, (see 1 Lev. 25; 8 East, 187.) wherein the orders of the Court for granting letters of administration are entered, or an examined copy of the entry in the book, or an exemplification of the letters of administration, will also be evidence; see 13 East, 238. If the lessor of the plaintiff make title as assignee of a term, from an administrator, cum testamento annexo, an exemplification though not in hæc verba, yet agreeably to form of the Ecclesiastical Court, will be good evidence; see Ca. Temp. Hard. 108.

§ A guardian in socage has an interest in the lands of the infant, until the latter attain to the age of fourteen years, which will enable him to maintain an action of ejectment to recover them; see Doug. 472; 1 Salk. 563; Cro. Car. 319. To make out his title, he must prove, 1st, that the infant is the heir to socage lands, which is to be proved, as in the case of title by an heir, by evidence of the seisin of the ancestor, of his death, and of the pedigree; 2d. His own character as guardian, that is, that he is next of blood to the heir to whom the inheritance cannot descend; see 1 P. Wms. 260; 9 Mod. 120;) and show that the infant was under the age of 14 at the time of the demise; for from that time the title of the guardian ceases; see Bac. Ab. tit. Guardian, 5 T. R. 471. A guardian, who has been appointed by deed or will, by virtue of the stat. 12 Car. 2. c. 24., must prove his appointment, either by the deed of the father, or his last will and testament, executed, as the statute directs, in the presence of two witnesses, the title of the infant and his minority, at the time of the demise; see 2 Phill. Ev. 201; 2 Stark. Ev. 521.

|| When ejectment is brought by the heir at law, he ought properly to prove a regular pedigree, to support his derivative right from the ancestor under whom he claims; see 2 Blac. Rep. 1099; and that such ancestor was duly seised of the estate, of which fact the actual possession of it, or receipt of rent from a tenant in possession, is nearly conclusive evidence. In order to support a pedigree, the Courts have deviated from the strict rules of evidence applicable to modern facts, by admitting hearsay evidence and reputation to prove the pedigree of consanguinity to the party under whom he claims as heir; see Phill. Ev. 185 Petersd. Sup. Blac. 155.

** Where an ejectment is brought by a landlord against his tenant, the plaintiff will not be obliged to give any evidence of his title anterior to the lease, for the tenant cannot dispute the title of him under whom he originally derived possession, although the latter is not barred from showing that the title of his landlord has subsequently become extinct; see 4 T. R. 683; but the paramount title opposed to the lessor must be a good subsisting one; for the mere production of an ancient lease, though 1000 years old, will not be sufficient, unless he likewise establishes an actual possession under it within 20 years; see Bull. N. P. 110.

- 1st. *On expiration of term.** 2nd. *On determination of yearly tenancy.†*
3rd. *For forfeiture.‡*

(l) *By mortgagee.§* (m) *By tenants in common and joint.*

1. *DOE, D. WHITE, v. CUFF.* H. T. 1808. K. B. 1 Campb. 173.

In ejectment it appeared that the plaintiff was entitled to an undivided moiety of one tenement and three-fourths of another, in the possession of the defendant. It was contended that, in the absence of proof of an actual ouster, the plaintiff must be called. To which it was replied, that the defendant, by appearing, confessed lease, entry, and ouster.

Per Lord Ellenborough, C. J. The consent rule must be produced to see whether it be common or special: it being in the common form, the plaintiff had a verdict

2. *DOE, D. GRIGNOR, v. ROE.* E. T. 1810. C. P. 2 Taunt. 397.

The defendant showed by affidavit that he was coparcener. A rule nisi had been obtained that the tenant in possession might be at liberty to confess lease and entry only, but not ouster, unless an actual ouster of the plaintiff's lessor should be proved at the trial, the real defendant's affidavit, on which the rule was obtained directly disaffirming an actual ouster. The Court held, that it was merely a matter of course to grant the rule wherever the defendant was a joint tenant, tenant in common, or coparcener. mon, will be allowed to confess lease and entry, without ouster, unless an actual one be proved.

XVI. RELATIVE TO THE WITNESSES.

1. *DOE, D. WINKLEY, v. PYE.* T. T. 1795. K. B. 1 Esp. 364.

In ejectment, the counsel for the defendant wished to call the tenant in possession to prove upon what terms he took the premises of his lessor. But Lord Kenyon, C. J. was of opinion that, being a tenant in possession, he could not be examined.

2. *DOE, D. JONES, v. WILDS.* M. T. 1813. C. P. 5 Taunt. 183; S. C. 1 Marsh. 7. S. P. *DOE, D. LEWIS, v. BINGHAM.* T. T. 1821. K. B. 4 B. & A. 672.

Ejectment. The defendant, in order to show that he was not in possession of the premises, called his son to prove that he (the son) was in possession of them; but the learned judge, being of opinion that this was not a competent

* Which will be proved by the same evidence as proves the lease, namely, by the counter-part, or by secondary evidence of the contents of the lease; and if the duration of a term depends upon a certain event, that event must be proved to have happened; see 2 Phill. Ev. 175.

† Which is usually done by a regular notice to quit, which may be proved by a duplicate original, without proof of a notice to produce the one delivered; see 1 Phil. Ev. 480; if it were attested, the subscribing witness must be called; see *ibid.* A parol notice may be proved by the person who delivered it, or by one who heard it delivered; the time for quitting mentioned in the notice must be proved to correspond with the close of the current year's tenancy; see 1 Phil. Ev. 109; 2 Camp. 559; the signature of the landlord must be proved; see 5 East. 491. So, when the notice is given by an agent, some proof of the agent's authority will be requisite; see 2 Campb. 76; the service must also be regularly proved; see 4 T. R. 464; and *div.* "As to the service of the declaration," *supra* post, tit. Landlord and Tenant, where all cases relating to the notice will be collected and analyzed.

‡ The tenancy is to be proved in the regular manner, and the breach of covenant, which occasions the right of re-entry, must be duly proved; see 2 Phill. Ev. 17 *supra* post, tit. Forfeiture.

§ If the mortgagee be himself in possession, evidence of the due execution of the deed will be only necessary; but if the premises are in the occupation of a third person, it is incumbent in the mortgagee also to prove that such third person has paid rent to, or otherwise acknowledged, the title of the mortgagee; see Peake, Ev. 349.

|| A bare refusal to pay over his share of the profits to a tenant in common, is not evidence of ouster; but if, upon demand of possession by a tenant in common, the co-tenant refuse and claim the whole, it is proof of actual ouster; see 11 East, 49; Cowp. 217. The payment of an entire rent to the lessors of the plaintiff is evidence of their joint-tenancy; see 12 East, 221.

** Where two persons are contending for the possession, who are to pay rent in different rights, it seems that the landlord is not a competent witness to prove the priority of the demise in an action of ejectment; see 3 T. R. 308; Style, 482.

[628]
If one tenant in common brings ejectment against another, the plaintiff is bound to give evidence of an actual ouster, or to produce the

[629]
consent rule, confessing ouster. || And a joint tenant, partner, or tenant in com

A tenant in possession cannot be called to support his landlord's title.**

Or to prove possession in himself.

witness, refused to admit his evidence, and a verdict was accordingly found for the plaintiff. The Court afterwards refused a rule to set it aside.

3. FENN, D. PEWTRESS AND THOMPSON, V. GRANGER. H. T. 1812. K. B. 3 Camp. 177.

And one of two lessors in ejectment by several demises cannot, though he has no interest in the premises, be required to impeach the title of the other lessor.

In ejectment, the defendant proposed to call A. B.'s co-lessor, in whom no title appeared, to prove that, by the direction of C. D., he had distrained upon the defendant, for the rent of the premises in question; and that C. D., having thereby acknowledged a tenancy, had precluded himself from bringing an ejectment without a notice to quit. It was contended, that a person who appeared on the record as a lessor of the plaintiff could not be compelled to give evidence. To which it was replied, that the lessor of the plaintiff in ejectment must be considered a stranger as much as the lessor in an action of covenant by the assignee of the reversion; and, if he could not be examined, it would become a common practice in ejectment, where it was apprehended that the evidence of any particular person would be unfavourable to the action to disqualify him by inserting a demise in the declaration.

See per Lord Ellenborough, C. J. If it appears that the party's name be inserted merely with the view to disqualification, we shall know how to deal with it. But, as a general rule, all lessors in ejectment must be deemed plaintiffs on the record, and therefore incompetent. All are jointly liable for costs; however, T. P. was examined by consent.

4. DOE, D. HINDLY, V. RICKARBY. E. T. 1803. K. B. C. P. 5 Esp. 4.

But a breach of covenant, by underletting is provable by the person found in possession. So the declarations of a tenant in possession of premises are admissible to negative an inference of adverse possession.

In ejectment, founded upon a proviso for re-entry, if the lessee should assign, or underlet, it was ruled by Lord Alvanly, C. J., that, if a person were found in possession, acting and appearing as tenant, it was sufficient *prima facie* evidence of an underletting to call upon the defendant, the lessee, to show in what character such person was upon the premises, and that the declarations of such person were admissible in evidence against the lessee.

5. DOE, D. HAMAN, V. PETTITT. M. T. 1821. K. B. 5 B. & A. 223.

Action of ejectment. General issue. It appeared that A. B. was the original purchaser of the premises, and that after his death, about thirty years ago, his widow continued in possession for about twenty years, and then died. The defendant was the heir at law of the widow, and the lessor of the plaintiff was the heir at law of A. B. In order to show that the widow's possession was not adverse, the Court admitted evidence of her declarations during her possession of the premises, showing that she held the premises for her life, and that, after her death, they would go to the heirs of A. B. The plaintiff had a verdict, which was now confirmed.

XVII. RELATIVE TO THE TRIAL.*

Where it is admitted that the plaintiff is entitled to recover a part of the premises, the Court will not inquire into the precise boundaries.

DOE, D. DRAPERS' COMPANY, V. WILSON. H. T. 1819. K. B. 2 Stark. 477.

In ejectment, the defendant admitted that the plaintiff was entitled to recover the ground, first and second floors, but not the upper part of the house, being about to give evidence of this; Abbott, C. J., was of opinion, that a question of boundary could not be tried, as the action decides nothing as to the quantum. If he took too much on the execution of the writ of possession, the defendant might bring trespass, in which case the premises might be set out by metes and bounds.

XVIII. RELATIVE TO THE VERDICT.†

* As the same course is to be pursued on the trial of an ejectment as other causes, it will suffice to refer to post, tit. Trial.

† The plaintiff in an action of ejectment will recover, according to the title he makes out, although it vary and be inconsistent with the one stated in the declaration; for the true question to be determined is, who has the possessing right; see Bull. N. P. 106. Therefore the plaintiff may, without incongruity, recover as many acres as he proves title to, notwithstanding he may have declared for more, and if the declaration state a demise for seven years, though he can substantiate his title for five only, he will be entitled to recover according to his title, notwithstanding the variance; see 3 T. R. 13. A verdict cures a defect in setting out the title, though it cannot cure a defective title; see 2 Burr. 1159.

XIX. RELATIVE TO THE JUDGMENT.*

(A) MOTION FOR.†

1. ANON. T. T. 1814. K. B. 2 Chit. Rep. 190. S. P. ANON. 1758. K. B. 2 Kenyon, 272.

The Court in this case held that it was too late to move for judgment against the casual ejector in Trinity term, when the notice to appear was in the preceding Michaelmas term.

2. DOE, D. STOTT, V. ROE. H. T. 1815. K. B. 2 Chit Rep. 189. S. P. ANON. T. T. 1818. *ibid*.

This was an ejectment for lands in Lancashire. The declaration was served in the long vacation, to appear generally of Michaelmas term. No rule had been drawn up for judgment, it being a country cause, and, on applying for it at the office, it was refused. Bayley, J., gave leave.

(B) RULE FOR.‡

* The judgment is, that the plaintiff do recover his term or terms, according to the number of demises in the declaration of and in the tenements, which is either against the casual ejector, or against the tenant upon a verdict: the former is generally before, the latter always after, an appearance; see Run. Ejectment, 402; but the casual ejector is not restricted in any case to confess a verdict; see 1 Stra. 531.

† The motion for judgment against the casual ejector is a motion, of course, requiring only the signature of a counsel or serjeant; and when the motion paper is signed, it should be taken by the plaintiff's attorney to the clerk of the rules in the King's Bench, or to one of the secondaries in the Common Pleas, who will draw up the rule. In the King's Bench, if the premises be situate in London or Middlesex, and the notice require the tenant to appear on the first day, or within the first four days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear in four days, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until a later period of the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, in order that the plaintiff may proceed to trial at the sittings after term; but if the motion be not made before the last four days of the term, the tenant need not appear until two days before the essoign-day of the subsequent term; see Adam. Eject. 2 Ed. 217, 218; Imp. K. B. 673. 677. In the Common Pleas, it is a rule that the motion should be made, in town causes, within one week next after the first day of Michaelmas or Easter term, or within four days next after the first day of Hilary or Trinity Terms; see R. T. 22 Car. 2 C. P.; but this rule relates only to ejectments served on tenants in possession, and does not extend to cases where the possession is vacant, or on the statute 4 Geo. 2, c. 28; see Barnes, 172; which may, therefore, be moved at any time in term; Barnes, 172. In country ejectments, when the declaration was served before the essoign-day of Easter or Michaelmas term, with notice to appear in those terms, the plaintiff, in the King's Bench, must formerly have moved for judgment the same term in which the tenant had notice to appear; see Run. Eject. 2 Ed. 191. Imp. K. B. 673. 677; but afterwards he was allowed in that Court, 3 Chit. Rep. 189. as well as in the Common Pleas, Barnes, 186. 250; 4 Taunt. 738; Run. Eject. 2 Ed. 191; to move for judgment at any time during the next issuable term. The rule for judgment in such case was at first only a rule to show cause, in the King's Bench; Doe, ex. d. Pearson, v. Roe. H. 54 Geo. 3. K. B. Adam. Eject. 2 Ed. 219; 2 Chit. Rep. 189. (a.) But afterwards, a rule absolute was granted in the first instance; 2 Chit. Rep. 189; which, however, was required to be served on the tenant; though where the notice was to appear in Michaelmas term, it was deemed too late to move for judgment in Trinity term following; 2 Chit. Rep. 190. And now, since the late rule, (R. E. 2 Geo. 4., 4 B. & A. 539; K. B. 2 B. & P. 705; the motion for judgment, in country causes, should in all cases be made, in the term in which the tenant is required by the notice to appear; see Tidd. Prac. 537, 538.

‡ On moving for judgment against the casual ejector, when there is any thing in the service of the declaration out of the common way, it should be mentioned to the Court, from the affidavits, and they will thereupon either grant or refuse the rule for judgment in the first instance; or if the matter be doubtful, will grant a rule to show cause, why the service sworn to should not be deemed sufficient. When the service of the declaration is perfect, as where it was personally delivered, and the notice read over and explained to the tenant, or his wife, the Court, on motion, supported by a proper affidavit, will grant a rule absolute, in the first instance, for judgment against the casual ejector, and a similar rule will be granted, where the declaration was left with a relation or servant of the tenant, who afterwards acknowledged the receipt of it before the essoign-day of the next term. The rule for judgment is absolute, in the first instance, when the premises are deserted, and the landlord proceeds on the stat. 4 Geo. 2. c. 28; or, in the King's Bench, on a vacant possession. But, when the service of the declaration is imperfect, as where the tenant absconds, or keeps out of the way, to avoid being served, &c., the Court will grant a rule to show cause why service of the declaration, by leaving a copy of it with his relation, or servant, or other person upon the premises, or by fixing the same upon some conspicuous part thereof, should not be

[631]
Motion for judgment should not be two terms after notice to appear.
[632]
But a declaration in a country cause, served prior to Michaelmas term, does not oblige plaintiff to proceed to judgment before Hilary.

It has been said, the rule for judgment against the casual ejector must be drawn up absolutely.

[633]
A rule was granted against a tenant, under 1 G. 4. c. 87,* and it was entitled Doe, d. &c. v. Roe. On default, judgment

1. GOODTITLE, D. ———, v. BADTITLE. T. T. 1819. K. B. 1 Chit. Rep. 499.

A proper affidavit of service of the declaration in ejectment not having been produced, it was proposed to draw up the rule for judgment against the casual ejector, upon the production of an affidavit, disclosing the requisite facts.

Sed per Cur. This cannot be done. The rule would appear to be made upon one day, and the further affidavit to have been produced on another.

2. DOE, D. MARQUIS OF ANGLESEY, v. BROWN. T. T. 1823. K. B. 3 D. & R. 230.

A motion was made to set aside the rule for judgment for an irregularity, because it was entitled, Doe, d. Marquis of Anglesey, v. Brown. It appeared, deemed good service; and in default of appearance, judgment should not be entered against the casual ejector; and will direct, by the rule, in what manner it shall be served: 1 Stra. 575; Cas. Temp. Hardw. 164; Barnes, 173. 188. 190. 192; 2 Burr. 1116; 1 Blac. Rep. 290; S. C. id. 317; 2 Burr. 1181; 2 Wils. 263; 3 Moore, 576; 1 Chit. Rep. 100. (a.); 2 Chit. Rep. 176, 177, 178; Adm. Eject. 2nd edit. 210. It was formerly usual, in the King's Bench, to grant such rule, with respect to future service only, and not with any retrospect; 2 Burr. 1116; 1 Blac. Rep. 290; S. C. id. 317; but the practice of that court was altered in the beginning of last reign; 2 Burr. 1116; 1 Blac. Rep. 290; S. C. id. 317; and made conformable to the course of the Common Pleas; Barnes, 173. 188. 190. 192; and it is now the practice in both courts to grant the rule, on a proper affidavit, for giving effect to a past service. This rule may either be granted upon the tenant, his attorney, or other person, by name, or generally without naming any person in particular; 2 Chit. Rep. 183; and if the rule be made absolute, the rule for judgment will be drawn up as a matter of course. When the tenant, or his wife, refuses to accept a copy of the declaration, the rule for judgment, we have seen, is absolute in the first instance, or the Court will only grant a rule nisi, according to circumstances. But the rule is always nisi when the tenant absconds or keeps out of the way, to avoid being served, and a copy of the declaration is, in consequence, delivered to a relation, or servant, or other person, on the premises. The rule for judgment against the casual ejector, in the King's Bench, is a conditional rule or order of the Court, that, "unless the tenant in possession of (or, if the premises are untenanted, 'unless some person claiming title to') the premises in question, shall appear and plead to issue on a certain day, being four days after granting the rule in town causes, or four days after the last day of term in country causes, judgment shall be entered for the plaintiff, against the casual ejector, by default. In the Common Pleas, the rule is, that, "unless the tenant in possession of the tenements in question, or some other person concerned in the title thereof, shall appear on a certain day, by an attorney of that court, who shall then forthwith receive a declaration, and plead thereto the general issue; and consent to the common rule for confessing lease, entry, and ouster, upon the trial to be had, judgment shall be entered against the casual ejector; and in the mean time, proceedings are to stay; when there are several tenants in possession of the premises, and it appears from the affidavits that they have all been served, there is only one rule for judgment against the casual ejector, wherein they are mentioned generally as "tenants in possession of the premises in question, though the name of each tenant was separately prefixed to the notice served on him; 7 Durnf. and East, 477. But where it does not appear from the affidavits that all the tenants have been served, the rule is drawn up specially mentioning the name or names of those tenants only who have been served, and describing them as "tenant, or tenants in possession, of part of the premises." And where there were separate declarations, and the notices to appear were addressed to the tenants severally, and there are separate affidavits of service, several rules are drawn up, as in several ejectments, and they must afterwards, if necessary, be consolidated. The rule for judgment, in town causes, we have seen, is for the tenant, or tenants in possession, to appear and plead, in the King's Bench and Common Pleas, on a day certain in term, at the distance of four days from the day of granting the rule. In country causes, the tenant, or person, claiming title to the premises, had formerly, in all cases, until four days after the end of the next issuable term, to appear and plead; Ad. Eject. 2nd edit. 219; 4 Taunt. 738; Run. Eject. 2nd edit. 191. And in the Exchequer, it was a rule, that, "in all country ejectments which were moved in a term not issuable, the defendant should have four days next after the end of the issuable term, immediately succeeding the respective terms in which such ejectments were moved, to appear thereto." But now, by a late rule of all the courts (R. E. 2 Geo. 4; 4 B. & A. 539; 2 Chit. Rep. 375, 376. K. B.; 2 B. & B. 705; 5 Moore, 637; 2 Chit. Rep. 380; C. P. 9 Price, 299; Exchequer; and see a former rule of T. 26 & 27 Geo. 2. s. 7; 8 Price, 212; but see R. H. 39 Geo. 3; Exchequer Man. Ex. Appen. 224; 8 Price, 504; contra, Adam. Eject. 2nd edit. 219, 220.), in all country ejectments which shall be served before the essoign-day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following; see Tidd. K. B. 538.

* Under which statute, if the tenant put in bail except to them in the ordinary way, in

that in the last term a rule had been made absolute, that the defendant should [634] now enter into recognizances within fourteen days, according to 1 Geo. 4. c. 87, which was entitled Doe, d. Marquis of Anglesey, v. Roe; and that, on default judgment had been signed, and the costs taxed. It was contended that the rules ought to have had the same title, and that the defendant was justified in treating the latter rule as a nullity.

Sed per Cur. In the statute, the word defendant is used without saying whether the judgment shall be against the casual or real defendant. When the tenant has appeared, he is made the defendant, and the judgment should be against him by name. We think, therefore, that it is doubtful whether this is not the most correct method of entitling the rule for judgment.—Rule refused.

(C) HOW ENTERED.

(a) When defendant will not confess lease, entry, &c.

TURNER v. BARNABY. T. T. 1702. K. B. 1 Salk. 260.

In ejectment, if at the trial the defendant will not appear, and confess lease, entry, and ouster, the course is, to call the defendant and his attorney, if he be within the rule; and then to call the plaintiff himself and nonsuit him; and then, on the return of the *postea*, judgment will be given against the casual ejector.

(b) When sole defendant dies.†

(c) When one of several defendants dies.

GREE v. ROLLE. H. T. 1700. K. B. Ld. Raym. 716.

Per Cur. If an ejectment is brought against two, and issue is joined, and then one of them dies, and a *venire* is awarded as to the two defendants, and a verdict against two, yet, on suggestion of the death of one of them on the roll, the plaintiff shall have judgment for the whole against the other; Cro. Jac. 303. 274; 2 Keb. 845. because this action is grounded on torts, which are several in their nature, and one may be found guilty, and the other acquitted.

(d) Against feme when baron dies.§

(e) When whole or part of the premises are recovered.||

order to compel a justification; and if he fail to justify his bail; or, if no bail be put in; or the defendant have not entered into the consent rule with the undertaking above-mentioned within the time given by the Court for that purpose, then, upon affidavit of that fact and of the service of the rule absolute above-mentioned, you may move for judgment against the casual ejector; and the rule granted in such a case is a rule absolute in the first instance; see Arch. P. K. B. 66.

* With respect, however, to the time of entering the judgment, a considerable difference prevails between the practice of the K. B. and C. P., the judgment being signed, and the execution taken out in the latter court, immediately after the entering of the nonsuit; in the former, not until the day in bank, when the *postea* is returned; see 2 T. R. 779; Adams, Ejectment, 284.

† If a sole defendant die after the commencement of the assizes, and before verdict; or after verdict, and before judgment, it will not abate the suit, nor can his death be alleged for error, provided the judgment be entered within two terms after the verdict; see 17 Car. 2. c. 3.

‡ The suggestion need not be entered upon the N. P. roll; for it is sufficient if it there appear to the judge what he is to try, and between whom; nor need the judgment say *quod querens nil capiat per breve* against the dead defendant; see Burr. 362. But, if the lessor proceed to trial, and obtain judgment against all the defendants without such suggestion, it is error; because there can be no verdict, or judgment against a person not in being; see Gibb. Eject. 98. The entry of judgment, notwithstanding the death of one of several defendants ought to be general, that the plaintiff recover his term in the premises against the survivors; see 1 Burr. 362.

§ If an ejectment be brought against baron and feme, and the plaintiff have a verdict against both, before judgment the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; see Cro. Jac. 336; 1 Roll. 14.

|| If the plaintiff obtain a verdict for the whole, the entry of the judgment is, that the plaintiff recover his term in the premises aforesaid, or recover possession of the term aforesaid. And this form is adopted where a moiety, or other part, is recovered; but the execution must be confined to that which the plaintiff has a right to recover; see Carth. 390; 5 Mod. 285.

was entered up, and that rule was entitled Doe, d. &c. v. A. the name of the tenant, and the Court held, that it was regular,

If defendant refuses to confess lease, entry, and ouster, the plaintiff must be nonsuited, and judgment entered against casual ejector.

[635] If one of several defendants die, and the death be suggested on the roll,† the plaintiff may have judgment against the rest.

(f) *Within what time.* See *ante*, divisions as to Motion for, p. 631, and Rule for judgment, p. 632.

(D) AS TO THE REVIVAL OF.

1. WITHERS v. HARRIS. M. T. 1701. K. B. Ld. Raym. 806.

If execution be not taken out for a year and a day after judgment, it must be revived by *scire facias*.
An *habere facias possessionem* was sued out on a judgment in ejectment, after a year and a day past after the judgment was obtained, without suing out a *scire facias*, and it was argued, that there ought to be a *scire facias*, and cited 1 Sid. 361; 2 Keb. 307. On the other hand, it was allowed, there must be a *scire facias*, for the damages, but not as to the term; for till the reign of King Charles II. it was doubted whether a *scire facias* would lie on a judgment in ejectment, as appears by 2 Keb. 55; 1 Sid. 317; and before that time no *scire facias* had been brought; and the plaintiff here as in the case of a real action, may execute a judgment in ejectment by entry without a writ of execution; 2 Sid. 156; 1 Rol. Rep. 215; Noy, 11; Palm. 263.

Holt, J. C., said, that as to the possession of the land, an ejectment was real, and was the only remedy for a term for years, and a recovery in ejectment binds the right and interest of him that has the inheritance, and makes a title in the plaintiff; and therefore the *scire facias* is as necessary in this as in any real action.

2. DOE v. RENDELL, AND ANOTHER. T. T. 1819. K. B. 1 Chit. Rep. 535.

A motion had been made on a former day for a *scire facias*, to revive a judgment in an ejectment, tried in 1798, in the course of which year, judgment had been entered up, but no writ of possession had been sued out. The object of the application was to enable the lessor of the plaintiff to obtain possession. It appeared upon affidavit, that the term laid in the declaration had expired, and consequently that the writ of *habere facias* which must be issued upon this motion would be irregular, and that another tenant was now in possession of the premises. The Court therefore proposed that the plaintiff, before he could move for the *scire facias*, should take a rule nisi, to amend the declaration by enlarging the term.

Per Cur. Even if the term mentioned in the declaration had not expired, we ought not, under the circumstances of this case, to allow a *scire facias* to issue. The result of the authorities which have been cited is, that the expiration of the term shall not preclude the party from bringing a *scire facias* upon the judgment, but that an application may be made to the Court to enlarge it. Such application is, however, purely to the discretion of the Court. It must be proved that no mischief will arise from a compliance with the request of the party. But no such thing is here proved. On the contrary, it is admitted that the owner of the estate against whom this action of ejectment was brought, is now dead, and that the then occupier is not in possession. Now supposing that the plaintiff had sued out execution at the proper time, the defendant would not have been estopped from bringing a fresh ejectment, and again questioning the right of the plaintiffs. If we, therefore, grant this amendment we place the defendant in a worse situation than he would have been in then, and benefit the plaintiff, for his having been guilty of laches, and not suing execution, as the defendant is now, from the lapse of time, barred from bringing a fresh ejectment, and the death of witnesses may, for aught we know, have occurred, so as to deprive him of the evidence necessary to support his case. We must, therefore, discharge the rule.—Rule discharged. See 2 Stra. 1272; 1 Ld. Raym. 669; Cowp. 841; 4 Burr. 2447; 2 Bl. 940; 1 Salk. 258.

(E) OF SETTING IT ASIDE, See div. (H) 640, "As to Setting aside Execution."

(F) WHEN EVIDENCE.*

XX. RELATIVE TO THE DAMAGES.†

* The judgment in ejectment is conclusive evidence as to the title of the lessor, in action for mesne profits; see Burr. 665. But it is not evidence in a subsequent ejectment, even between the same parties; see Adams. Ejectment, 188.

† The damages are merely nominal, and it is usual to remit them, in order to recover a real compensation in an action for mesne profits; see Peter's Sup. Blac. 156. and post, *jit*, Mesne Profits,

XXI. RELATIVE TO THE COSTS.

(A) SECURITY FOR. See *ante*, vol. vii. p. 11.

(B) PLAINTIFF OR DEFENDANT WHEN ENTITLED TO.

(a) *In general.**

1. ANON. M. T. 1703. K. B. 6 Mod. 309.

Per Cur. It is a great abuse in ejectment, that people make nominal lessees of persons not existing or at best not known to the defendant; so that he thereby may lose his costs. And by the whole Court, the attorney that does where the so ought to pay costs; and in this case an attorney was put to answer interrogatories for such a practice.

2. DOE, D. JOHNSON V. ROE. M. T. 1821. C. P. 6 Moore, 331.

A motion was in this case made for a rule to show cause why it should not be referred to the prothonotary, to take an account of monies received by the lessor of the plaintiff, on account of certain annuities, as well as to ascertain and settle the costs of this action, which had been brought for the non-payment of rent. Nothing was taken by this motion.

(b) *Against several defendants.*

JORDAN V. HARPER. E. T. 1721. K. B. 1 Stra. 516.

Sir S. S. brought a suit in ejectment against several persons who lived in cottages on the waste as paupers, to try whether the cottages belonged to him as lord of the manor. The parish made defence, and the plaintiff was nonsuited, and paid the costs to one of the defendants, who was in his interest; and on motion the Court said, they could not relieve the parish or the other defendants; vide Stra. vol. i. p. 516.

(c) *As to executors.* See also *post*, tit. Executor and Administrator.

DOE V. GRUNDY. H. T. 1823. K. B. M. S.; S. C. 1 B. & C. 284; S. C. 2 D. & R. 437.

Cause was shown against a rule, calling on the executrix of the lessor of the plaintiff to pay the costs of a nonsuit. It appeared that the lessor of the plaintiff, having entered into the common consent rule, died after the commission day, the assizes, and that on the trial there was a non-suit on the merits.

Per Cur. The common undertaking of the testator to pay the costs, according to the common consent rule, is merely a personal undertaking to the Court, and only rendered him liable to an attachment, not to be sued. It is not a contract, so as to affect the executrix. The judgment, in fact, is against John Doe. The case cited is a direct authority on the subject.—Rule discharged.

which a non-suit was taken on the merits, and the Court decided that his executrix was not liable for the costs.

(d) *Under 1 Geo. 4. c. 87.*

DOE, D. SAMPSON, V. ROE. T. T. 1821. C. P. 6 Moore, 54.

The Court in this case observed, that under the 1 Geo. 4. c. 87. they were only empowered to give a reasonable sum for the costs of the action, and not for the mesne profits, and that what was to be considered a reasonable sum must be ascertained by the prothonotary.

(C) REMEDY FOR. See *ante*, vol. vii. from p. 27 to 30.

XXII. RELATIVE TO THE EXECUTION.

(A) WHEN ESSENTIAL.†

* If the tenant in possession does not appear, and judgment be entered against the casual ejector, the plaintiff has no other remedy for his costs than by his action for the mesne profits, in which they are recoverable against the tenant, as consequential damages; see Run. Ejectment, 144. But if the tenant appear, and be made defendant on the usual terms, and afterwards at the trial refuses to confess lease, entry, and ouster, he is liable upon the rule for the payment of costs, and for the recovery of which an attachment lies, and where he confesses the stipulated facts, and upon the trial a verdict be given against him, the judgment is entered against the tenant, on which judgment the plaintiff may take out execution, as in ordinary cases; see Run. Ejectment; 415.

† But if they fail, each of them is answerable for the whole costs; see Bull. N. P. 335. And before the 8 & 9 W. 3. c. 11. if one of several defendants had been acquitted, he was entitled to his costs. But now he is the same as if he recovered.

‡ When lessor of the plaintiff prevails, he may enter peaceably upon the premises re-

[637]

In ejectment, it seems, the attorney is answerable where the plaintiff is nominal.

The Court will not refer it to the officer to ascertain the costs of the action brought for non-payment of rent.

When several defendants succeed, the plaintiff may pay costs to whom of them he pleases.†

[638]

The lessor in an ejectment cause died after the commission-day of the assizes, but before the trial, at

Under the 1 G. 4, c. 87. the Court can only give a reasonable sum for costs of the action, and not for mesne profits.

(B) MOTIONS FOR.

DOE, D. SIMONS, v. MASTERS. H. T. 1819. K. B. 1 Chit. Rep. 233. S. P.

DOE, D. ROBERTS, v. GIBBS. *ibid.* 47.

The appli-
cation for
execution a-
gainst the
casual ejec-
tor, where
the land
lord de-
fends alone,
is only a
rule *Nisi*,
[639]

An application was made for leave to issue an execution against the casual ejector, after a verdict against the landlord, who defended the ejectment alone; and it was urged, that the rule ought to be absolute in the first instance. But the Court only granted a rule *Nisi*.

(C) HOW TO BE TAKEN OUT.

(a) *On judgment for want of appearance.* See *ante*, 612. div. vii. "Relative to the appearance and judgment against casual ejector for non-appearance."

(b) *When sole or some of defendants die.*

WITHERS v. HARRIS. M. T. 1701. K. B. 2 Ld. Raym. 806.

When a
sole defend-
ant dies, a
scire facias
as seems
necessary.
but not
when one
of several
defendants
die.

Per Holt, C. J. The reason why *scire facias* were rarely sued in such case is, because the plaintiff generally sues out execution immediately. Where there are several plaintiffs or defendants, and one of them dies, execution may be sued out by or against the survivors, upon suggestion of the death made upon the roll. But where there is but one defendant, and he dies, it is a question whether execution may be sued out without a *scire facias*.

(c) *When defendant marries before execution.* See *ante*, vol. iv. p. 135.

(D) SHERIFF'S INDEMNITY.*

(E) HOW,† AND AT WHAT TIME TO BE EXECUTED.

1. DOE, D. PALMERSTON, v. COPELAND. M. T. 1788. K. B. 2 T. R. 779.

In K. B. if
plaintiff be
non-suited
because the
defendant
does not
confess
lease, en-
try, and
oust, the
writ of pos-
session
should not
be execu-
ted, until
[640]

In ejectment, the defendant not having confessed lease, entry, and ouster, at the trial the plaintiff was nonsuited, and immediately afterwards entered up judgment against the casual ejector, and took out a writ of possession before the *postea* came in on the day in bank. On a rule to set it aside, the court held the judgment prematurely signed, and cited 2 Lill. Pract. Reg. 423. and said, if the practice in C. P. were settled otherwise, that would not alter the mode of proceeding in this court, because they thought the method in their own court the best beyond all doubt. But as there appeared no reason why the lessor of the plaintiff was not ultimately entitled to possession, it was agreed that he should remain, it being referred to the Master to settle what damages defendant had sustained by the premature issuing of the writ of possession.

2. THROGMORTON v. BENTLY. H. T. 1786. C. P. 2 T. R. 780. n.

the day in
bank when
the *postea*
is returned.
But in C.
P. it may
be immedi-
ately after
the trial.

In ejectment, where the defendant had not confessed lease, entry, and ouster, and, whereupon, the plaintiff was nonsuited, the question was, whether judgment could be signed, and a writ of possession taken out before the day in bank. The court, after taking time to consider, held the practice to be that they might.

(F) ATTACHMENT FOR DISTURBING.

covered, without any writ of execution, because the land recovered is certain; see Burr. 60; 2 Sed. 155. But it is more prudent to sue out a writ of execution, which is called an *habere facias possessionem*, under which a full and actual possession must be given by the sheriff, who is authorised, if it be for the recovery of a house, to break open the door, if he be denied entrance by the tenant, as the writ otherwise could not be executed; see 5 Co. 916; B. c. Ab. Ejectment, (E. 2.)

* The sheriff, it seems, previous to the execution of the writ, may demand an indemnity from the plaintiff, see Gilb. Ejectment, 110.

† When the sheriff has to deliver possession of any particular number of acres, he must estimate them according to the custom of the country in which the lands lie; see Roll. Ab. 886. The possession to be given by the sheriff is a full and actual possession, and he is armed with all power necessary to this end. Consequently, if entrance be denied, he may break open doors; see 5 Co. 91. (b.)

If the lessor recover several messuages, in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession thereof (which is done by turning out the tenants); for the delivery of the possession of one messuage in the name of all is not a good execution of the writ, since the possession of one tenant is not the possession of the other; see 1 Roll. Ab. 886. But when the several messuages are in possession of one tenant only, it is sufficient, if he give possession of one messuage in the name of all; see 1 Roll. Rep. 420; and the same rule must be observed as to land; see 1 Roll. Ab. 886.

KINGSDALE v. MANN. M. T. 1700. K. B. 6 Mod. 27. S. P. DAVIES D. POVEY.
v. DOE. E. T. 1773. C. P. 2 Blac. 892.

The court held, that if immediately after execution the defendant entered the plaintiff out of possession, it would be such a disturbance of the execution as to render him liable to an attachment. An attachment lies for disturbing the execution.

(G) WHETHER A SECOND EXECUTION IS ALLOWABLE.

DOE, D. PATE, v. ROE. M. T. 1807. C. P. 1 Taunt. 55.

The plaintiff had been put into possession of the premises by virtue of a writ of *habere facias possessionem*, on the 22d of February, 1806, and that on the 10th of October, 1807, while he continued in possession, one A. B. forcibly ejected and retained possession. On motion that a new writ of *habere facias possessionem* might issue, If a writ of possession be once executed, a second will not be granted on a subsequent eviction.

The court said that, after possession had been given, the plaintiff cannot afterwards have another writ, whether the former one be returned or not.

(H) OF SETTING ASIDE AND STAYING EXECUTION.

1. DOE, D. TROUGHTON, v. ROE. M. T. 1766. K. B. 4 Burr. 1906.

A judgment had been regularly obtained by the plaintiff against the casual ejector by default, and the tenant not having given his landlord notice, motion was made to set it aside. Upon its coming on again, the tenant admitted himself to be in fault, and submitted to the court. The landlord was an infant; and, therefore, could not consent to the trial of the question (which was heirship) in an issue. But as relief was, on his behalf, prayed against a judgment which was strictly regular, there could be no doubt but that the court might add such terms and conditions to such relief as were just and equitable, by bringing the real question between the plaintiff and him to be tried upon the real merits. The court accordingly ordered the judgment, and also the writ of possession, to be set aside, and referred it to the Master to tax the lessor of the plaintiff his costs, together with the costs of this application, to be paid by the tenant in possession. And it was further ordered, that the landlord be made defendant, as in the conditional rule; and that he shall, upon the trial of the issue to be joined between the parties, not set up any satisfied term, or any trust estate, to defeat the lessor of the plaintiff; and also admit that claimant was seised of the premises in question. Judgment against the casual ejector will be set aside, even after execution on affidavit of merits.

2. DOE, D. GROCERS' COMPANY, v. ROE. M. T. 1813. C. P. 5 Taunt. 205.

The Grocers' Company had demised a house to A. B., with a proviso for re-entry in case of bankruptcy or underletting. A. B. obtained a licence to underlet, and did so to C. D., and subject to such underlease, assigned the premises to E. F. as a security. E. F. died—A. B. became bankrupt. The Company, therefore, served a declaration in ejectment on C. D., who delivered it to the executrix of E. F., but she, through inadvertence, had permitted judgment to go by default, and the plaintiff's lessors had obtained a writ of possession, and executed it on C. D., whom they turned out of possession, and instantly re-demised the same premises to him as their tenant. It was suggested, that this ejectment had been brought by C. D.'s procurement, because he could rent the premises upon better terms of the Company than of E. F., and she prayed to be restored to her possession, in order to try the question, whether the licence to make the underlease did not discharge the condition for entry on bankruptcy, as well as on underletting. The Court made the rule absolute, on payment of costs, for setting aside the judgment and execution, and permitting the late landlord of the tenant in possession to try the same. Or on account of collusion, and the *mesne* landlord will be let in to try.

3. DOE, D. SEDGER, v. ROE. E. T. 1811. C. P. 3 Taunt. 504.

Motion to set aside judgment and execution, on payment of costs, and that A. B. might be let in to defend. A. B. had had notice of the ejectment, but had concluded, from plaintiff's former conduct, that it would not be proceeded in. *Per Cur.* We cannot assent to the application. But *aliter* where no defence has been made from a supposition that the action would not be proceeded in.

4. DOE, D. HOLMES, v. DARBY. M. T. 1813. 3 Taunt. 538; S. C. Nom. Doe, D. HOLMES, v. DAVIS. 2 Moore, 581.

The landlord of premises, after notice to quit, brought an action of ejectment against the tenant, and obtained a verdict. The latter still continuing in possession, brought an action of ejectment against the landlord, and obtained a verdict. And a distress after verdict in e.

jectment is session, the landlord afterwards distrained on him for rent, which became due no cause after the verdict, and which he paid. An application was made to stay the for staying execution in ejectment. the execution.

Sed per Cur. The defendant should have disputed the distress. It is now too late to disturb the verdict, and the defendant is not without his remedy.

[642]

XXIII. RELATIVE TO THE NEW TRIAL, AND SECOND ACTION FOR THE SAME PREMISES.*

WEAK, D. BURGE, v. CALLAWAY. M. T. 1819. Ex. 7 Price, 677. S. P. CLYMER v. LITTLER. M. T. 1761. K. B. 1 Blac. 345.

The Court will never grant a new trial after verdict for defendant, unless material evidence has been discovered, and on payment of costs of former.

After verdict for the defendant, the lessors of the plaintiff discovered that they had conclusive evidence of a material fact which they had failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married; it was also stated to be expected that they might be obliged to enter, to avoid a fine intended to be levied, before a new ejectment could be brought. It was contended that there was no case like the present, where an application for a new trial had been granted on behalf of a plaintiff. However, the Court made the rule absolute, on payment of costs of the preceding trial, and of the present application.

XXIV. RELATIVE TO THE WRIT OF ERROR†

1. GEORGE, D. BRADLEY, v. WISDEM. H. T. 2 Burr. 756.

To enable the landlord to proceed with the writ of

On a rule to show cause why a writ of *habere facias possessionem* should not be set aside with costs, as being irregularly issued and executed, and why possession of the premises in question should not be restored to the defendant.

* We have seen that a judgment in ejectment confers no title upon the party in whose favour it is given; and that it is not evidence in a subsequent action, even between the same parties. From these circumstances, it is manifest, that the judgment can never be final; and that it is always in the power of the party failing; whether claimant or defendant, to bring a new action. The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment; for the plaintiff in the suit is only a fictitious person, and as the demise, term, &c. may be laid many different ways, it never can be made to appear that the second ejectment is brought upon the same title as the first. It is said, by Mr. Sergeant Sellon, 2 Sell. Prac. 114, "that it has sometimes been attempted in Chancery, after three or four ejectments, by a bill of pence to establish the prevailing party's title; yet it hath always been denied; for every termor may have an ejectment, and every ejectment supposes a new demise; and the costs in ejectment are a recompense for the trouble and expense to which the possessor is put. But that when the suit begins in Chancery for relief, touching pretended incumbrances on the title of lands, and the Court has ordered the defendant to pursue an ejectment at law, then, after one or two ejectments tried, and the right settled to the satisfaction of the Court, the Court hath ordered a perpetual injunction against the defendant, because there the suit is first attached in that Court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the Court to relieve against it." It should seem however, from the cases of *Barefoot v. Fry*; *Bunb. 158*; and *Leighton v. Leighton*; 1 P. Wms. 671. that courts of equity will sometimes interfere, and grant perpetual injunctions when the ejectments have been commenced in the usual way at the common law. And in one case, where upon a most vexatious prosecution of ejectments, the Court of Chancery refused to grant a perpetual injunction, upon an appeal to the House of Lords, the injunction was allowed; see *Adams, Ejectment*, 318.

A writ of error in ejectment cannot be brought in the name of the casual ejector; see *Barn. 181.*, and consequently it will not lie until after verdict; for before appearance, the casual ejector only is the defendant in the suit, and after appearance, the new defendant is bound by the terms of the consent rule to plead the general issue. If also the defendant refuse at the trial to confess, &c. he will be precluded from bringing error, because the plaintiff will then be nonsuited as to him, and the judgment will be entered against the casual ejector. By statutes 16 & 17 Car. 2. c. 8. s. 3 & 4., it is enacted that no execution shall be stayed by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a nonsuit, or discontinuance had; and in case of affirmance, discontinuance, or nonsuit, the Court may issue a writ to inquire, as well of the mesne profits, as of the damages by any waste committed after the first judgment; and are upon the return thereof to give judgment, and award execution for the same, and also for costs of suit. The words of this statute seem to render it necessary for the plaintiff in error to

The case was on an ejectment brought, in which W. (the landlord) had, on [643] the tenant's refusing to appear, made himself defendant in the place of the casual ejector (against whom judgment was signed for want of appearance), and the plaintiff having obtained judgment against the defendant, W. the landlord had afterwards moved for leave to take out execution against the casual ejector, from which he was restrained by the conditional rule, "for a stay of execution against the casual ejector till further order," made in consequence of a clause in statute 11 Geo. 2. cap. 19. which gives leave for making the landlord defendant in the room of the non-appearing casual ejector on the foregoing terms. The Court were of opinion, that the day of showing cause against the rule was the proper time for the landlord to have made his stand against the plaintiff's taking out execution and getting into possession, and that he should have then shown his writ of error, as cause why the plaintiff ought not to have had leave to take out execution, and why it ought not still to have been further stayed; but having omitted so to do, he had lost his opportunity, and therefore the execution was regular, and ought not to be set aside.

2. *Wharod v. Smart*. M. T. 1765. K. B. 3 Burr. 1823.

The defendant having brought a writ of error in parliament, on an ejectment on the demise of B; the Court obliged the defendant to enter into a rule not to commit waste or destruction pending the writ, which not being opposed by the defendant's council, he entered into the said rule, and also justified in 400*l*.

3. *Badger v. Floid*. E. T. 1699. 12 Mod. 378.

The plaintiff had judgment in ejectment; on which a writ of error being brought, bail was given to prosecute, and answer the mesne profits; and pending it, the plaintiff brought an action of debt for rent.

Per Cur. The writ of error does not hinder the plaintiff from bringing an action of debt, or distraining for his rent; and here he might have entered without a writ of execution, for only all executions by writ are suspended by the writ of error; and in a real action, after judgment, the plaintiff may enter, notwithstanding a writ of error, if his entry was lawful without the judgment, for that is not by force of the judgment, which shall not put him in a worse condition than he was in before.

XXV. RELATIVE TO SETTING ASIDE AND STAYING PROCEEDINGS.

(A) IN GENERAL.*

he be personally bound; but by a reasonable construction, it is held sufficient, if he procure proper sureties to enter into the recognisance of bail, for otherwise lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a feme covert after action brought, would be entirely excluded from the benefit of the act; *Barnes v. Palmer*; *Carth.* 221; *Lushington v. Dose*; 7 Mod. 304; *Keene, d. Ld. Byron, v. Deardon*; 8 East, 298. But although the sureties may be examined as to their sufficiency, the plaintiff in error cannot; and therefore, where the lessor of the plaintiff swore that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more than it is worth, the Court still held that the defendant's recognisance was sufficient to entitle him to his writ of error; *Thomas v. Goodtitle*; Burr. 2501; *Keene, d. Ld. Byron, v. Deardon*; 8 East. 298. The reasonable sum in which the plaintiff in error is bound under this statute is generally double the improved rent of the premises in dispute, and the single costs of the ejectment; *ibid.* The writ of error does not operate as a stay of execution until bail is put in, which cannot be done until the plaintiff's lessor has taxed his costs, for until costs are taxed, the amount of the penalty of the recognisance of the bail in error cannot be fixed; and if the lessor choose to waive his taxation of costs, and proceed for his possession only, the Court will not interfere to prevent him, notwithstanding the allowance of the writ of error; *Doe, d. Messiter, v. Dinely*; 4 Taunt. 289. When the plaintiff's lessor proceeds against the bail by action on the recognisance, they are not chargeable with the mesne profits under the statute 16 & 17 Car. 2. c. 1. s. 4., unless their amount has been first ascertained by writ of inquiry, pursuant to the provisions therein contained; see *Doe v. Reynolds*, 1 M. & S. 247; and *Adams, Ejectment*. 311.

* With regard to setting aside and staying proceeding, the Courts possess a discretionary power; hence when ejectment is brought on the forfeiture of a lease, the proceedings will be staid, upon the application of the tenant, until the lessor of the plaintiff has delivered a particular of the breaches of covenant on which he intends to rely; see *Adams*

(B) IN PARTICULAR.

(a) *In the case of mortgages.*

1. SKINNER V. STACEY. M. T. 1744. K. B. 1 Wils. 80.

After an agreement by the mortgagor to convey the equity of redemption to the mortgagee, a rule was granted on the 7 G. [645]

The defendant being a prisoner, moved that, upon paying the principal, interest, and costs, to be computed and taxed by the Master, all proceedings in this action, upon a bond for performance of covenants in a deed of mortgage, and in an ejectment brought upon the same mortgage, might be stayed upon the statute 4 and 5 Anne, and that the defendant might be discharged out of custody. For the plaintiff it was objected, that the defendant had agreed to convey to the plaintiff the equity of redemption; but, it appearing upon an affidavit read, that the plaintiff had not tendered to the defendant a deed of conveyance to be executed, and that no bill in equity was brought, the Court granted the motion, after time taken to consider thereof.

2. GOODTITLE, D. TAYSUM, V. POPE. E. T. 1797. K. B. 7. T. R. 185.

1. * to stay proceedings. But where several applications to complete the purchase.

Motion to stay proceedings in an ejectment, brought by a mortgagee against mortgagor, on the latter paying principal, interest, and costs; it appeared that several applications had been made to the mortgagor, but without effect, to complete the purchase.

Per Cur. The mortgagor has no right to redeem; a court of equity would Ejectment, 314. So, under the 4 Geo. 2. c. 28. s. 4., where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to commence an action, but before declaration had been delivered, the Court set aside the proceedings with costs; see Blac. Rep. 747.

* Chap. 20., it is enacted, that when an ejectment is brought by a mortgagee, his heirs, &c. for the recovery of the possession of the mortgaged premises, and no suit is depending in any court of equity for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall at any time pending the suit pay to the mortgagee, or in case of his refusal, bring into court all the principal monies and interest due on the mortgage, and also costs to be computed by the Court, or proper officer appointed for that purpose, the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the Court shall discharge the mortgagor, of and from the same accordingly.

By the third section, the act is not to extend to any case where the person against whom the redemption is prayed shall insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause or suit shall be controverted or questioned, by or between different defendants in the same cause or suit. An application for a rule to stay proceedings under this statute must of course be made before execution executed, and must be accompanied by an affidavit that no suit in equity is depending. The party should also appear to the action before the application is made, for the courts have no power to interfere under the statute until after appearance; see Adams, Ejectment, 321.

In a case where, upon an application by the mortgagor to stay proceedings under this statute, it appeared that he had also taken up money from the mortgagee upon his bond, the Court granted the rule upon the payment of the mortgage money and interest only, the bond debt not being a lien upon the lands; but it seems that when in such case the heir is bound by the bond, and the mortgagor dies, the heir must discharge the bond debt as well as the mortgage; Bingham, d. Lane, v. Gregg, Barn. 182; Archer, d. Hankey, v. Snapp, And. 341, S. C. Stran. 1107.

Where, however, the bond was a lien on the estate, and the mortgagee had given notice to the mortgagor that he should insist upon payment of the money due upon it, the Court refused to stay the proceedings upon payment of the mortgage money; Felton v. Ash, Barn. 177. Where also other mortgages, although upon different premises, existed between the defendant and the plaintiff's lessor, the Court will not stay proceedings under this statute, upon the payment of the sum due upon one of the mortgages only; see Blac. 726. If upon a motion of this nature, any doubt exist as to the amount of what is due between the parties, the Court of King's Bench will refer the case to the Master, and the Court of Common Pleas to the prothonotary, whose respective duty is to tax the costs; and in a case where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession (the ejectment being brought for the residue), and it was prayed, that the prothonotary might be directed to make allowance for such repairs; the Court said, that the rule must follow the words of the statute, and that the prothonotary would make just allowances and deductions; Goodright v. Moore, Barn. 176. If however, after taxation the debt and costs are not paid, the lessor must proceed in the suit, and cannot have an attachment; Hand v. Dinely, Stran. 1220; Adams, Ejectment, 326.

decree him to complete the agreement made in 1792. This is an application without of against the justice of the case, and if we were to listen to it, and strip the fact, the mortgagee of his legal title, it might let in a posterior equitable right to the court re- the prejudice of the mortgagee, though he shall hereafter obtain a decree for fused to stay proce- the performance of his agreement in 1792. See 4 Taunt. 886. dings.

(b) *In the case of costs.*

1. *Until security for be given.* See also *ante*, vol. vii. tit. Costs. Where plaintiff is an infant, security for costs must be given. 1. THROGMORTON, D. MILLER, v. SMITH. E. T. 1731. K. B. 2 Stra. 932. And if lessor die pending suit, though they cannot stay the proceedings *in toto*, they will not suf-

The lessor of the plaintiff being an infant, the Court was moved that he might be obliged to name a good plaintiff, who might be answerable for costs: accordingly, there was a rule to stay proceedings until security was given. See 2 Stra. 694; 1 Wils. 130; Cowp. 128. 2. THRUSTOUT v. GREY. M. T. 1723. K. B. 2 Stra. 1056. On a special verdict in ejectment, it appeared that the lessor of the plaintiff claimed as tenant for life; and on affidavit made of his death, it was moved that all proceedings might be staid, since it would signify nothing to argue it on though they the merits. *Per Cur.* The possession cannot be obtained, yet the plaintiff cannot stay the proceedings *in toto*, they will not suf- fer the action to proceed until security for costs be given.

3. GOODRIGHT v. JONES. M. T. 1718. C. P. Ca. Prac. 15. A motion in ejectment, that the lessor should name a plaintiff, who should be liable to pay costs, because the lessors themselves were very poor. The Court denied the application. But pover in the lessor is no ground for the Court's interference.*

2. *Until payment of the costs of a former action..* 1. ANON. H. T. 1701. K. B. 1 Salk. 255. S. P. GRUMBLE v. BODILLY. T. T. 1722. K. B. 1 Stra. 554. If a second ejectment be brought before costs of the former are paid, proceedings will be staid.†

H. brought an ejectment in C. B., and was nonsuited, and costs were taxed on the non-suit; the plaintiff brought a new ejectment in C. B., and a rule was made to stay all proceedings till the costs of the nonsuit were paid. Then he brought an ejectment in this court, and on producing the rule of the Court of C. B. the same rule was made here. If a second ejectment be brought before costs of the former are paid, proceedings will be staid.†

2. SHORT v. KING. H. T. 1738. K. B. 1 Stra. 681. S. P. LORD CONINGSBY'S CASE. H. T. 1722. K. B. 1 Stra. 548. S. P. THRUSTOUT v. TROUBLESOME. M. T. 1738. K. B. 2 Str. 1077. Though for merly fraud or collusion were essential.‡

The plaintiff declared in ejectment, on one demise, to which not guilty was pleaded; but afterwards finding it necessary to add the demise of the trustees, he delivered a new ejectment, on a double demise; whereupon it was moved to stay the proceedings on the last suit till payment of the costs. The Court said it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expense.

3. DOE, D. DUCHESS OF HAMILTON, v. HATHERLY. E. T. 1740. K. B. 2 Stra. 1152.

There being judgment for the defendants in the cause of Thornby v. Fleetwood, and that judgment affirmed in this court and the House of Lords, on ejectment being brought by the remainder-man, the Duchess brought a new ejectment, in which some of the then defendants were defendants now. And on motion to stay proceedings till the costs in the first ejectments were paid, the Duchess insisted, that the former was on the demise of the Duke and her; and the rule was in the singular number, that the demisor of the plaintiff be chargeable. But now proceedings will be staid, whether the two ejectments be brought up on the demise of the

* And security for costs is not required in ejectment where the lessor of the plaintiff is known of full age, and resident in this country, see 1 T. R. 491.

† So if three actions be brought in K. B., and two in C. P. for the same premises, proceedings will be staid; see Adams, Ejectment, 321. And where thirty-seven were brought for the same number of houses, all of which depended on the same title, the Court staid proceedings in thirty-six of the actions; see Sell. Princ. 144.

‡ And previous to the introduction of the present practice, the courts would not interfere unless the two ejectments were brought in the same court; see 1 Sid. 279; Comb. 106.

same or different parties.

So, ejectment by a fraudulent assignee of an insolvent debtor were staid till costs of former ejectments brought by the debtor himself were paid. Formerly, there was [648] a distinction as to the situation of the

Per Cur. We are not going to order the Duchess to pay costs, but only prevent her from being vexatious; which, in 4 Mod. 349. is said to be the foundation of these rules. Besides, in this case, she proceeded after the death of the duke; and, therefore, let the rule be to stay the proceedings in this cause till the costs are paid in the other.

4. *DOE, D. CHADWICK, V. LAW.* H. T. 1778. K. B. Blac. 1180.

Ejectment by the assignee of an insolvent debtor. A rule was granted to stay proceedings till former costs were paid, the assignment being merely fraudulent, and for the purpose of vexation. *Per Cur.* This being a mere contrivance to defraud defendant, we shall stay proceedings till the costs of the former ejectment are paid.

5. *ROBERTS V. COOK.* H. T. 1693. K. B. 4 Mod. 379.

An ejectment was brought in the C. B., and a verdict given for the plaintiff, but he had no costs; and now the defendant in that action brought a new ejectment in this court against the same plaintiff; and it was moved that he might have his costs before he should be compelled to plead to the new action. But it was not granted, because he had no vexation, the verdict being for him; but if it had been against him, or that he had been nonsuited, he should not have brought another action before the costs of the suit had been paid, because it was a vexation to bring a new action.

parties, that if defendant on second ejectment had been plaintiff in first, proceedings should not be staid.

6. *THRUSTOUT, D. WILLIAMS, V. HOLDFAST.* E. T. 1795. K. B. 6 T. R. 233; *S. P. KEENE, D. ANGEL, V. ANGEL.* T. T. 1796. K. B. 6 T. R. 740. *S. P. DOE, D. FELDON, V. ROE.* T. T. 1800. K. B. 8 T. R. 645.

But now a different rule holds.

In ejectment a rule was obtained to show cause why the proceedings should not be stayed till the costs of the former ejectment were paid to the defendant; it was contended, that the general rule did not apply to the present case, where the lessor of the plaintiff was the defendant in the former ejectment, and cited *Roberts v. Cook*, 4 Mod. 379. But the Court said, the rule that if the same plaintiff bring two ejectments for the same estate, the Court will compel him to pay the costs of the first before he proceeds in the second, must clearly be applicable to the present case, since the Court would draw no distinction between the parties being plaintiff or defendant.

And if the party's conduct appears vexatious, they will stay proceedings, though he was not liable to the costs of first action.

7. *SMITH, D. GINGER, V. BARNARDISTON.* E. T. 1772. C. P. Blac. Rep. 904. The lessor of the plaintiff in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although nonsuited for want of a replication, he was exempted from the costs of the defendant's appearance. The Court would not let him proceed in the second ejectment until he had satisfied the defendant for the expenses of such first appearance.

8. *DOE, D. PINCHARD, V. ROE,* H. T. 1804. K. B. 4 East, 585. *S. P. DOE, D. WALKER, V. STEVENSON.* H. T. 1802. C. P. 3 B. & P. 22.

So, proceedings in a second ejectment were stay

The Court made a rule which had been obtained to stay proceeding in this action (of ejectment) absolute. The rule had been obtained to do so until the costs of an action for *mesne* profits (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error,) as well as the costs of the first ejectment, were paid.

ed until payment of costs in former suit, and also in action for *mesne* profits.

9. *DOE, D. CHURCH, V. BARCLAY.* H. T. 1812. K. B. 15 East, 233.

But the Court in staying proceedings in a fresh action of ejectment between the same parties

An application was made to stay proceedings in action of ejectment, until the costs of a similar action, which had been brought between the same parties, as also the damages and costs of an action of *mesne* profits, were paid. But the Court said that, though they would stay proceedings in a new ejectment until the costs of a former ejectment between the same parties, and also the costs of an action for *mesne* profits dependant thereon were paid, yet they could not extend the rule to include the damages in the action for the

mesne profits, however vexatious the proceedings of the parties might have [649] been.

have been paid, will not take into account the *damages* in the action for *mesne* profits; ties until prior costs

10. *DOE, D. SUTTON, v. RIDGWAY.* H. T. 1822. K. B. 5 B. & A. 53. And leave will not be given to *non pros* a second ejectment, unless the costs of the former one were paid by a certain day. So, proceedings in ejectment were staid till costs of nonsuit in former action to try same title were paid. But proceedings will not be staid in ejectment till costs in equity incurred by the same parties respecting the same property are liquidated. The application to stay proceedings may be made at [650] any stage of the suit.

11. *DOE, D. COTTERELL, D. ROE,* H. T. 1819. K. B. 1 Chit. Rep. 195. A rule had been obtained for staying the proceedings till the costs of a former ejectment, brought by the same lessor of the plaintiff, were paid. It appeared that a former ejectment had been brought, and that a nonsuit had taken place. The second action was brought entirely upon the same title.

Per Cur. The only question in this case is, whether the second ejectment is, in substance, brought to try the same title; if so, the rule is of course, to stay the proceedings, until the costs of the former ejectment have been paid.

12. *DOE, D. WILLIAMS, v. WINCH.* E. T. 1820. K. B. 3 B. & A. 602. This was an application to the court to stay proceedings in an action of ejectment until not only the costs at law, but the taxed costs of a suit in equity, brought by the same party, for the recovery of the same premises, were paid.

Per Cur. We cannot interfere, or look to the costs incurred on the other side of the hall. Were we to do so, we should be going further than any court of law ever has done. The costs at law are the legal consequences of the suit; the costs in equity are in the discretion of the Chancellor, and entirely depend upon circumstances.

13. *DOE, D. CHADWICK, v. LAW.* T. T. 1776. C. P. 2 Blac. 1158. A former ejectment had been brought in the King's Bench, between the same parties, and the plaintiff proceeded in this Court for costs for not proceeding to trial; it was taxed. Now, it being moved to stay the proceedings in this cause till the costs of the former were paid, it was urged, on showing that the application was too late, as notice of trial was given for the 19th of June, and this motion for a rule *nisi* was not made till the 13th, when the plaintiff had prepared for trial, and was ready with his witnesses. But the Court, on considering all the circumstances, made the rule absolute.

Election.

I. OF PERSONS.

(A) IN GENERAL.

See *tit.* Bankrupt, Churchwarden, Constable, Corporation, Ecclesiastical Persons, Militia, Overseer, Sheriff.

(B) TO SERVE IN PARLIAMENTS.

1st. For England.

1. As to who are eligible.

- (a) Grounds of incompetency, p. 652. (b) Qualifications of, p. 653.
(c) Effect of choosing incapacitated persons, p. 653.

2. As to the electors.

- (a) For counties, p. 655. (b) For cities, towns, and boroughs, p. 656

3. As to violations of the *Electors' Rights Act*.

- (a) By improper conduct of candidates, p. 657. (b) By purchase of votes, p. 658. (c) By interference of persons in authority, p. 658. (d) By the military, p. 659. (e) By the clergy, p. 659.

4. As to the election proceedings.

(a) As to the writ.

- (a 1) As to issuing it upon summoning a new parliament, p. 660. (b 1) As to issuing it on a vacancy, p. 660. (c 1) As to its delivery, p. 661.

ELECTION.—Who are Eligible.

- (b) As to the precept, p. 662.
 (c) ——— notice of the election.
 (a 1) For counties, p. 662. (b 1) For places being counties of themselves, p. 663. (c 1) For boroughs and towns, p. 663.
 [651] (d) As to the place of election.
 (a 1) For counties, p. 663. (b 1) For other places, p. 663.
 (e) As to the day of election, p. 663. (f) As to the erection of booths, p. 664. (g) As to an officer's duty previous to the demanding of a poll, and the term of the demand of a poll, and the appointment of sub-sheriffs, poll-clerks, &c. p. 664. (h) As to proceedings during the poll, p. 665. (i) As to proceedings upon close of the poll, p. 666. (k) As to the custody of the poll-books, p. 667. (l) As to the return to the writ, p. 668.
 5. As to proceedings upon controverted elections.
 (a) Petitioners, p. 668. (b) Petitions.
 (a 1) Form of, p. 669. (b 1) Presentment of, p. 669. (c 1) Recognizances connected with, p. 670. (d 1) Withdrawing a petition, p. 671.
 (c) Committee.
 (a 1) Proceedings of the house previous to the sitting of the committee, p. 671. (b 1) Proceedings of the house after the sitting of the committee, p. 672.
 6. As to expenses of elections, p. 673.
 2ndly. For Scotland, p. 678.
 3rdly. For Ireland, p. 679.

II. CONNECTED WITH PROPERTY.

See tits. Baron and Feme, Copyhold, Estate in, Devise, Executor and Administrator, Heir, Infant, Life, Tenant for, Legacy, Marriage Settlement, Rent, Tail, Tenant in.

[652]

I. OF PERSONS.

(A) *Vide* ANALYSIS.

(B) TO SERVE IN PARLIAMENT.*

1st. For England.

1. As to who are eligible.

(a) Grounds of incompetency.†

* The law relative to convening parliament, proroguing or dissolving it, as to its duration, the enforcing the attendance of its members, and the privileges an election to sit in parliament creates, will be found under the titles of "Commons' House, Members of," and "Parliament."

† The following persons are ineligible to the House of Commons; aliens, 4 Inst. 47; denizens, or naturalized aliens; persons (12 & 13 H. 3. c. 2. s. 3.) attainted with treason or felony, 4 Inst. 47; outlaws in criminal but not civil proceedings; 2 Huts. 37; idiots, Hale's Parl. 116; and lunatics, unless in lucid intervals, *ibid.*; and the seat of a member becoming lunatic may be awarded, Granpound D'Ewes, 126; minors, 1 Bl. Com. 172; clergymen, 41 G. 3. c. 68; papists, as they cannot take the necessary oaths, 30 Car. 2. st. 4. c. 1.; peers, Scotch peers, Irish peers for places in Ireland, 39 & 40 Geo. 3. c. 67. art. 4.; the eldest sons of Scotch peers for places in Scotland, 13 Journ. 27; the twelve judges of England, 4 Inst. 147; Scotch judges, and barons of the Scotch Exchequer, 7 Geo. 4. c. 6. s. 4.; returning officers for their respective jurisdictions; each sheriff for his own county, or any borough, &c. within it, 9 Journ. 725; 1 Doug. 419; each mayor or bailiff for the particular borough or place for which he makes the return, *ibid.*; but the sheriff of a county at large may be elected for a town, being a county of itself, though within the local limits of the county at large, as the sheriff of Hampshire for Southampton, 4 Doug. 87; persons concerned in the management of the revenues, with some exceptions, are ineligible, 5 W. & M. c. 7. s. 517; 41 Geo. 3. c. 59; persons holding new offices under the crown, created since 1705, 6 Anne, c. 7. s. 25; together with the other persons mentioned in the same act, ineligible; so prisoners during pleasure or for term of years, *ibid.*; 1 Geo. 1. st. 2. c. 1. but a proviso received by the wife does not disqualify the husband, Reading v. Reading, 14; government contractors, 22 Geo. 3. c. 45. s. 1; and placement in the army or navy, specified in the 5 Geo. 2. c. 22. s. 9, are disqualified. All the above mentioned persons are incapable of being elected, sitting, or voting; but there are offices connected with the excise and customs which only disqualify the holders from sitting or voting, but not from being elected, 11 & 22 W. 5. c. 2. s. 150, 151, 252; these therefore if elected, may make their election good, and enable themselves to sit and vote by resign-

(b) *Qualifications of.**(c) *Effect of choosing incapacitated persons.†*

ing the office after the election, and before they take their seats, 16 Journ. 98; Orme, 265. Persons returned upon a double return are not competent to sit until the return is decided by a committee, Standing Order; but petitioners are eligible from any other place during the trial of their petition, Resolution, April 16, 1727. Absence from England is no ground of ineligibility, Simeon, 51; though it was once resolved to be so, 2 Hatsel, 22. And it is said to be doubtful, whether being in gaol in execution on a judgment renders a man ineligible. 2 Ba. Abrid. 143; 1 Hatsel, 155; Cen. Dig. Pierl. D. (9); but a poll was denied to a candidate, he being a person in execution for debt, and the sitting members were declared duly elected. Where the jurisdiction of an ancient court has been enlarged, and a new arrangement is made with respect to its officers, the ancient officers, though with new designations, are not within the disqualifying words of the statute, N. Berwick, 2 Doug. 423; as clerk of the pope of Scotland. But baggage master of the forces of Scotland was holden a new office, and within the statute, Fife, 1 Lud. 455. The acceptance of any office of profit from the crown by a member vacates his seat, 6 Ann. c. 7. s. 20. The receipt of the profit is immaterial; and there are two places of *no profit*, which for some avoidance of members desirous of retiring from parliament are considered within the statute, and enable them to vacate their seats, viz. the steward of the Chiltern Hundreds, and the steward of the East Hundreds, in Berns, Shep. on Election, p. 60. From all operations of this last statute, officers of the army or navy receiving new commissions are excepted, 2 Hats. p. 50; Orme, 272; but persons not actually in the service at the time they receive a commission are not protected by the exception, 2 Hats. pre. 54; Orme, 271. The acceptance of a foreign employment, as that of ambassador, does not vacate the seat, 2 Hats. 22. 25. n.; but a patent place for life, out of Great Britain, has been holden to do so, Orme, 261. A member becoming a bankrupt is incapable of sitting and voting for a year, unless within that time the commission be superseded, or the creditors paid the full amount of the debt; 52 Geo. 3. c. 144. Police magistrates are ineligible by 3 Geo. 4. c. 55. s. 14; and see Shepherd on Elections, p. 58, &c. It has been decided (Thompson v. Peard, abridged *ante*, vol. ii. p. 277.) that an army clothier is not a person within the meaning of the statute 22 G. Geo. 3. c. 45. prohibiting government contractors from sitting in parliament.

* The qualification of a knight of the shire is "an estate freehold or copyhold for his own life, or for some greater estate, either in law or in equity," of the clear annual value of 600*l.* in Great Britain or Ireland, 9 Ann. c. 5; 41 Geo. 3. c. 101. s. 23; 59 Geo. 3. c. 37; of a burgess or baron of the cinque ports of the clear annual value of 300*l.* such estate not being a mortgage, unless the mortgagee has been in possession seven years; *ibid.* But the following persons are made exceptions, and require no qualification by estate; the eldest son of a peer or lord of parliament, 9 Ann. c. 5.; or of a Scotch peer, Rochester, Corb. Dan. 238; or of a peeress, or bishop, 2 Hats. 59. n.; 7 Bac. Abridg. 430; or of any person qualified for a knight of the shire, 9 Ann. c. 5; as well as the members for the English Universities, 41 Geo. 3. c. 101; and for the college of the Holy Trinity, Dublin; *ibid.* After the election, and before he takes his seat, each member requiring a qualification by estate must take and subscribe an oath of its value, 33 Geo. 2. c. 20; and also the oaths of allegiance, 7 Jac. 1. c. 6; 20 Car. 2. c. 1; and supremacy, 2 Eliz. c. 1. s. 16; the declaration against popery, 30 Car. 2. st. 2. c. 1; and the abjuration oath, 13 W. 3. c. 6. s. 10; under severe penalties, 1 Geo. 1. st. 20. c. 13. s. 1. The oaths of allegiance and supremacy must also be taken before the lord steward, or his deputy, 7 Jac. 1. c. 6; 30 Car. 2. st. 2. c. 1; 5 Eliz. c. 1. s. 16. Persons sometimes become possessed of estates for the purpose of an election; where this is the case, it must of course, appear that the party conveying had a sufficient power of disposition, Coventry, 1 Perk. 93; but the qualification may be acquired during the course of the poll, 1 Bristol, Simeon, 51; though perhaps not after a refusal to take the qualification oath; see Shepherd on Election, 61.

† If there be no other candidate than the person incapacitated, the election will necessarily be void; but if there be another candidate having a minority of votes, it is a very important question, whether, in consequence of the incapacity of the former, the electors are to be called upon to reconsider their choice; or whether they are to be represented by the latter, as being the next upon the poll, and in reality to be regarded as first, by reason of the nullity of the franchises given to the other candidate. It will seem that the latter proposition is that which constitutes the law in cases where the misapplication of the franchise by the electors is wilful, and therefore made in their own wrong, but that it is confined to such cases. The criterion whereby to decide whether the misapplication of the franchises by the electors has been wilful, is by ascertaining whether or not the fact of ineligibility or disqualification in the candidate was sufficiently known to them. Upon this head it will first be shown, how far notice given of such fact is obligatory upon the electors, so as to preclude the plea of ignorance in them, and to annul the votes afterwards given by them to the incapacitated candidate, and it will afterwards be considered whether, in any case, the consequence can be the same where no notice has been given. That franchises so given after such notice are lost and thrown away has been the general doctrine, not only in par-

[654]

2. As to the electors.*

liamentary cases, but in cases of analogy in the courts of law. Nor does there appear to be any exception to this rule, unless where notice of incapacity in the candidate has been made under circumstances calculated to counteract that notice, and to impress the electors with an idea that there was no legal foundation for its purport. The following decisions have occurred upon this subject:—18 Jour. 126. 673; 1 Doug. 419; 1 Lud. 455; 38 Journ. 15. 245. 415. 689; Clifford, 1 222. 261. 342. 353. 860; 1 Perk. 526; 4 Doug. 87; 2 Lud. 269. Several exceptions have been urged as taking cases out of the foregoing rule, that votes given to an incapacitated candidate after notice of such incapacity are thrown away and lost, and that the electors in such case are to be represented by the candidate next upon the poll. Of these however, only one has been distinctly admitted; viz. that which is to be found in the case of Abingdon, 1775, 1 Doug. 419; where, although notice of the incapacity of one of the candidates was given to the electors, there was fair ground to suppose that they were misled by the declaration and conduct of the returning officer. Another exception contended for depends upon the time of giving the notice of disqualification it having been insisted upon, that it must be given before the commencement of the election; it seems however that notice at any time during the election will be sufficient, the effect of such notice being confined to the votes subsequently given; Roe on Elections, p. 275. It remains to consider, whether the notoriety of the circumstance, that a candidate is ineligible or disqualified, can, in any case, supersede the necessity of notice, so as to affect the electors with the same consequences as if notice had been actually given. The object of notice is to bring the law and fact of the incapacity of the candidate immediately within the knowledge and observation of the electors, and thereby to make them aware of the misapplication of their votes, after which if they persist in such misapplication, they do so of their own wrong, and the consequent loss of their franchise is their own voluntary act. In principle it seems not to be distinguishable, whether the circumstance of disqualification be within the knowledge of the electors, from being within their own observation, or whether from actual notice given to them; and that their votes would be thrown away in the former case equally as in the latter; 18 Journ. 126; Roe on Elections, 278.

* The right of voting for the choice of representatives to serve in parliament does not extend to infants, 7 & 8 W. 3. c. 25. s. 8; nor women 4 Inst. 5; nor aliens, 12 Journ. 367; unless made denizens by letters patent, or naturalized by act of parliament; nor idiots, 1 Hey. 259; nor lunatics, except during lucid intervals, 1 Hey. 261; but mere imbecility is not a sufficient exclusion, if the voter at the time understands what he is doing; 1 Perk. 108. Papists in Great Britain are disabled, if they refuse the oaths of allegiance, supremacy, or abjuration; 2 Lud. 267. Persons convicted of felony are disqualified, 1 Perk. 508; so of perjury and subornation of perjury, 2 Geo. 2. c. 24. s. 6; so of bribery, *ibid.* s. 7; but the mere declaration by a committee that a person has become guilty of perjury, will not operate as a disqualification; 2 Perk. 245. Whether outlawry in civil suits, or excommunication, creates a disability, has not yet been determined; Orme, 111; 1 Hey. 334. Some are excluded for the purpose of securing the freedom of election as peers; Annual Resolution. Irish peers, except when members of the House of Commons themselves; 57 Journ. 5, 376. Revenue officers are disqualified, but commissioners of the land tax, and persons acting under them, are exempted from disqualification, 22 Geo. 3. c. 41. s. 2; as well as those holding freehold offices by letters patent; *ibid.* s. 3. A sub-distributor of stamps appointed by the distributor was considered a good vote, 2 Lud. 552; 1 Feas. 164; 1 Perk. 373. A sub-deputy, appointed by a country postmaster to distribute letters in a certain district, and receive the postage at a certain profit per mile on each letter, whose name was in the Post-office book, was not disqualified, 2 Lud. 562; nor the guard of a mail-coach; 2 Feas. 454. Police magistrates, receivers of fees at the Police offices, and constables, whilst they remain in office, and for three months afterwards, are incapable of voting for Middlesex, Surrey or Westminster, or Southwark, 54 Geo. 3. c. 37. s. 15; and the same incapacity is extended to those of the Thames Police *ibid.* c. 187. s. 36. Another disqualification arises from the receipt of alms within a limited time before the election, generally a year, 2 Doug. 126; though in particular cases this period is extended; see 11 Geo. 1. c. 18. s. 14; 2 Doug. 104. By 18 Geo. 3. c. 59. s. 25. "Any relief given to the family of any militia-man during the time of actual service shall not deprive such militia-man from voting for the election of any member to serve in parliament." Private charitable assistance, furnished to a voter ought not to affect his franchise, 1 Perk. 508; but where a voter, upon his own application, and by order of the parish officers, was attended by the parish apothecary, his vote was not allowed; *ibid.* 508. There is another species of pecuniary assistance derived from "the revenue of certain specific funds which have been established, or bequeathed, for the purpose of assisting the poor, distinguished in the cases as 'charities';" 1 Doug. 370. The receipt of this relief has been, in many instances, considered as no disqualification; 2 Doug. 122; 1 Lud. 193; Orme, 121; 1 Perk. 510. One charity, however, called Wellborn's Charity, has been holden to work a disqualification; 2 Doug. 122. Perhaps the best rule upon this subject is in the words of Mr. Sergeant Heywood:—"To distinguish between charities which are of such a nature as to imply that the paraker of them is in a state of indigence and abject dependence, and those from which no such inference can be drawn. With respect to the former, they, like parochial relief, may work a disquali-

(a) For counties.*

[655]

fication of those who receive them, by proving their incapacity to exercise a will of their own in the choice of a representative.

* The present qualification of an elector for a county is a freehold estate in the county of the clear yearly value of 40s. above all rents and charges payable out of the same, 8 H. 6. c. 7; 7 & 8 W. 3. c. 7. s. 3; 10 Anne, c. 23. s. 3; 18 G. 2. c. 18. s. 1; of which freehold he must have been in possession, or in the receipt of the rents and profits, twelve calendar months before the election, 18 G. 2. c. 18. s. 1; unless it was obtained within that time by descent, marriage, marriage settlement, or promotion to a benefice or an office, and which freehold must have been assessed to the land-tax for six months before the election, except it consists of an annuity, rent-charge, or fee-farm rent, which are exempted from assessment if duly registered: 18 G. 2. c. 18. s. 2, 4; 20 G. 3. c. 17; 30 G. 3. c. 35; 3 G. 3. c. 24. Copyholds, therefore, are excluded from this franchise by the nature of their tenure, both at common law and by statute; 31 G. 2. c. 14. s. 1. Lands held in tenant-right, peculiar to the counties of Cumberland and Westmoreland, give no right to vote for counties, the freehold resting in the lord; 1 Heyw. 84. But a customary tenant holding of the lord of the manor, "according to the custom of the manor," not by copy of court-roll, and whose lands pass not by surrender and admission, but by feoffment, lease, and release, was considered to hold by freehold tenure, and entitled to vote; Gloster, 64; 1 Heyw. 82; but see Blackstone's "Considerations on Copyholders." As a tenement in law is whatever may be holden, and is not solely applicable to corporeal things, offices in which the holders possess a freehold interest confer a right of voting, when emoluments arising out of land are attached to them of sufficient annual value, viz. of 40s.; Shepherd on Elections, p. 7.

It was the practice to exclude the votes of persons who had married women entitled to dower, unless it had been set out by metes and bounds, 1 Hey. 98; but, by the 20 Geo. 3. c. 17. s. 12, this is remedied, with respect to the dower out of estates of which the first husband died seised or possessed. Joint tenants and tenants in common are allowed to vote, though the 7 and 8 W. 3. c. 25. s. 7, enacts, that no more than one voice shall be admitted for the same house, &c.; 1 Hey. 114; 2 Peck, 55. There were several instances before the Middlesex committee where votes for land-tax purchased were disallowed; 2 Peck, 91. By 38 G. 3. c. 69. s. 99, land-tax purchased was to be considered as personal estate, except in certain cases, s. 32. c. 10; but, by the 42 G. 3. c. 116. s. 54, for consolidating the several acts for the redemption of land-tax, it is enacted, that the purchasers of land-tax shall be deemed to be in the actual seisin or possession of a yearly rent, or sum, as a fee-farm rent, equal in amount to the land-tax so purchased; 2 Peck, 91. The freehold required by the statute 8 Hen. 6. as essential to the qualification of a country voter has always been considered the legal freehold, 1 Hey. 104; but, by 7 and 8 W. 3. c. 25. s. 7, it was enacted, "That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust, estate, or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but that the mortgagor, or cestui que trust in possession, shall and may vote for the same estate, notwithstanding such mortgage or trust.

The estate must be "of the clear yearly value of 40s. over and above all rents and charges payable out of, or in respect of, the same." No public or parliamentary tax, county, church, or parish rate or duty, or any other tax, rate or assessment whatsoever, to be assessed or levied upon any county, division, rape, lathe, wapentake, ward, or hundred, is, or shall be deemed or construed to be any charge payable out of, or in respect of, any freehold estate within the meaning and intention of this act, or of the oath, &c.; 18 G. 2. c. 18. s. 6. The Bedfordshire committee held that, under this clause, "the parochial taxes," when paid by the tenant, do not constitute a part of the rent paid by him for the land, and are not to be considered as part of the income in right of which the owner votes, 2 Lud. 475; and the same with respect to the window and house tax, *ibid.* 476; but a different determination was made as to the land tax, the payment of which was considered as forming part of the rent, or annual value, *ibid.* 446, 447; nor will the right of voting be defeated because a sum is to be laid out in repairs, which reduces the value below 40s.; *ibid.* 448. The 7 and 8 Wm. 3. c. 25. s. 7, enacts, "That all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, town corporate, port, or place, in order to multiply voices, or to split or divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted for the one and the same house or tenement;" and by 53 G. 3. c. 49, it is extended to devises by will.

The next statute to prevent these colourable conveyances is the 10th Anne, c. 23. s. 1, which declares, that all collusive grants for qualifications to vote shall vest in the grantees absolutely, discharged of any condition to reconvey or defeat the grant; and by the 18 G. 2. c. 18. s. 5, no vote is good in right of any freehold estate, fraudulently granted on purpose to give the vote, which provisions are only declaratory of the common law; 1 Dow. 223; 1 Heyw. 165. The legislature at length undertook to define what should be considered as a fraudulent conveyance, and required, except in particular cases, by 18 G. 2. c. 18. s. 1, a year's possession of the estate; and, by 20 G. 3. c. 17. s. 1, six months' assessment to the land-tax, before the owner should be entitled to vote. The act does not specify whether the

[656]

*(b) For cities, towns, and boroughs.**

twelve months are to be computed from the day appointed for the election, or the day on which the vote is given. Mr. Sergeant Heywood thinks it should be reckoned from the day on which the voter takes the oath and actually gives his vote; 1 Heyw. 168; but see the *Seaford Case*, Simeon, 129 n., and 3 Doug. 234 n. c.

The 30 G. 3, c. 85, requires, s. 1, "either that the freehold shall have been assessed for six calendar months before the election, in the name of the person claiming to vote, although the name of the tenant or tenants actually occupying such messuages, lands, or tenements, shall not be inserted in such assessment according to the form of assessments to the said first recited act annexed, or, (s. 2,) in the name of a tenant, or tenants actually occupying the same at the time of such assessment being made, although the name of the person so claiming to vote, &c., shall not be inserted in assessment, according to the form of the assessment to the said first recited act annexed. When votes are questioned before committees upon objections to the assessment, two conditions are necessary to support them; one, that the assessment sufficiently corresponds with the description of the freehold, &c., upon the poll; another, that the freehold is duly assessed. Persons who become entitled to lands, &c., within twelve months before the election, by descent, marriage, devise, promotion, &c., may vote for them, if within two years before the election they have been rated in the names of those through whom they claim, or some predecessor. It is not sufficient, that the premises have been rated within two years in the name of some predecessor, who might have held them previous to the two years; the assessment must be in the name of some predecessor in possession within two years; 2 Lud. 531.

It was determined by the Middlesex committee, that when a vote is objected to for want of assessment of the freehold, "and exemption is claimed on the score of an office, the party maintaining the same shall be called upon to prove the nature of the office, and the appointment of the voter." The statutes for the redemption of the land tax were consolidated by 42 G. 3, c. 116, which enacts, that persons claiming to vote for premises, the land-tax whereon has been redeemed, &c., shall be entitled to vote without being compelled to show that such messuages, &c., have been assessed to the land tax, upon proving to the satisfaction of the returning officer on oath, or otherwise, that such land-tax has, at any time previously to such election, been redeemed or purchased, and the said messuages, &c. become exonerated therefrom.

* 1st. As to persons possessing the right of voting in respect of property.—In many cities and towns which are counties of themselves, the right of election depending upon usage is in the freeholders of 40s. a year, which probably originated in a mistaken application of the statute, 8 Hen. 6, c. 7; see 2 Hey. 184. This right is recognised by the legislature in statute 19 Geo. 2, c. 28, by which, together with the 3 Geo. 3, c. 24, the right of voting for cities and towns of this description is put within the same restrictions with the right of voting for counties; except as to the assessment of the land and the registration of fee farm rents. Leaseholders in several boroughs enjoy the elective franchise; 2 Hey. 412. Cricklade is the only borough where common copyholders enjoy the franchise; and the occupation of the house for which the voter claims it, is required forty days before the election; *ibid.* 413, 414. Burgage tenants have also the right of voting, but the burgage tenement must be entire and undivided, as it existed before the time of legal recovery; 2 Fras. 151.

Tenements locally situated within a borough, but belonging to another district, rendering feudal services and profits to distant lords, do not privilege their holders to vote with the other burgesses; 2 Fras. 110, 111. Though burgage tenure is socage tenure, yet as lands were holden both in free and villein socage, it is not inconsistent with the nature of burgage lands to be holden by copy of court roll. The interest which the tenant is required to have in his burgage varies according to the uses of different boroughs. As there is no time limited by statute, for which burgage tenants must have been in possession, it depends upon the statute of William, and the rules of the common law, whether occasional conveyances of this species of property confer the right of voting. The statute 7 and 8 W. 3, c. 25, s. 1 enacts, "that all conveyances of any messuages, &c. in order to multiply voices, or to split and divide the interest in any houses or lands amongst several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect, and that no more than one single vote shall be admitted to one and the same house or tenement.

Questions connected with this statute have been fully discussed upon almost every petition against a return for a burgage tenure borough, and though there has been no express resolution upon the point, it seems to be considered that occasional conveyances in such boroughs are not illegal; 1 Doug. 209; 1 Peek, 818, 362, 340, 345; and *Shepherd on Elections*, p. 35, 36.

2ndly. As to persons possessing the right of voting in respect of corporate privileges.—The right of electing members of parliament exists either in the whole body, or a select part according to the constitution of the corporation. In some corporate towns the members of the corporation require a superadded qualification to entitle them to vote; *Carew*, 68. The freemen of a corporation cannot exercise the elective franchise unless regularly admitted and enrolled in the corporation books, *Worcester*, 8 Doug. 248; and the entry of the admission stamped, 5 Geo. 3, c. 46; except where, by custom, an admission in form

3. *As to violations of the freedom of elections.*

[657]

(a) *By improper conduct of candidates.**(b) *By interference of peers.†*

[658]

(c) *By the interference of persons holding certain offices.‡*

is unnecessary; *Sudbury*, 2 Doug. 132, 175. By the Durham act, 3 Geo. 3. c. 15, the admission must have been a year before the election, except in regard to persons entitled to their freedom by birth, marriage, or servitude. These excepted persons having been refused their admission, or having delayed this demand for admission till it was too late to enforce it by application for a mandamus, should nevertheless tender their vote at the election, and proceed to obtain their admissions afterwards, as the committee, upon proof of such facts, will allow the vote; 1 Fras. 166; 1 Doug. 464, 38, 300.

3rdly. As to persons possessing the right of voting in respect of inhabitancy.—The right of election arising from inhabitancy is modified in various ways, but in almost every borough some additional qualification is necessary. In order to provide against occasionality in boroughs of this description, every voter is required to have been an inhabitant six months before the election. "No person shall be admitted to vote at any election of a member or members to serve in parliament for any city or borough, of that part of Great Britain called England, or the dominion of Wales, as an inhabitant paying scot and lot, or as an inhabitant housekeeper, householder, and pot-waller, legally settled, or as an inhabitant householder, housekeeper, and pot-waller, or as an inhabitant householder resident, or as an inhabitant of such city or borough, unless he shall have been actually and bona fide an inhabitant paying scot and lot, or an inhabitant householder, housekeeper, and pot-waller, legally settled, or an inhabitant householder resident, or an inhabitant within such city or borough six calendar months previous to the day of election, at which he shall tender his vote; 25 Geo. 3. c. 100. s. 1, under penalty of 20l. "not to extend to any person acquiring the possession of any house, in any city or borough, by descent, devise, marriage, or marriage settlement, or promotion to any office or benefice; *ibid*.

* Such improprie conduct may consist in the offences of bribery and treating; as to which see 2 Geo. 2. c. 24; 2 Doug. 404. The Bribery Act makes no mention of any parliamentary disqualification, affecting a member's seat; the effect, therefore, of an act of bribery not within the words of the statute, 7 W. 3. c. 4, is in that respect determined by the law of parliament as follows: bribery by a candidate, though in one instance only, and though a majority of unbribed votes remain in his favour, will avoid the particular election, *St. Ives*, 2 Doug. 389. 414. and disqualify him from being re-elected to fill such vacancy, *Camelford*, *Corb. Dan.* 249. and the cases there cited. Treating not only avoids the candidate's return at the particular election, but, according to the received construction of the statute, disqualifies him at a subsequent election to supply the vacancy so occasioned; *First and Second Southwark*. *Clifford*.

† The freedom of election may be disturbed by undue or corrupt influence; this also is provided against by a resolution passed at the beginning of every session, and by a standing order to the effect, that it is a high infringement of the liberties of the Commons for any peer except Irish peers, when candidates for places in G. B., to concern themselves in the election of members of the House of Commons; and a declaration to the same effect was made by the house in 1779, in respect of the ministers and servants of the crown; 37 *Jour.* 507.

‡ The prohibition by the standing order of the House of Commons, as to the interference of peers, embraces also the cases of lord-lieutenant of counties, who are thereby not absolutely forbidden to concern themselves in elections, but it is declared to be a high infringement of the liberties and privileges of the Commons for any lord-lieutenant to avail himself of an authority derived from his commission to influence the election of any members to serve for the Commons in parliament. It seems that the lords warden of the cinque ports used formerly to claim, as of right, a power of nominating and recommending to each of the cinque ports the two ancient towns and their respective members, one person to be elected for each of such places; but the stat. 2 W. & M. c. 7, s. 1, after reciting by sec. 1, that they had so pretended and claimed contrary to the ancient right, usage, and freedom, of elections, declares, by sec. 2, all such nominations or recommendations to be contrary to the laws and constitution of this realm, and to be void to all intents and purposes. Upon the same principle, that persons holding certain offices are disqualified from being themselves in parliament, persons in the several offices hereinafter-mentioned are forbidden to interfere in elections; and heavy penalties are imposed upon such persons if they presume to interfere. Officers or persons employed in charging, collecting, levying or managing, the duties of excise not to interfere in elections, under a penalty of 100l., and disabled from holding any place or office under the Crown; 5 W. & M. c. 20, s. 48. Commissioners and officers of customs, post-masters, or post-masters-general, or their deputies, or persons employed in the revenue of the post-office, commissioners' officers, or persons employed in the duties granted by 9 Anne, c. 11, and 10 Anne, c. 16, are all liable to the same restriction and penalty which also applies to the magistrates and officers of all the police offices; but the penalty does not attach for acts done in discharge of duty; see 12 and 13 W. 3. c. 10. s. 91; 9 Anne, c. 10. s. 44. 49; 10 Anne, c. 19; 39 and 40 Geo. 3. c. 87. s. 24; 42 Geo. 3. c. 76. s. 15. Undue interference of all the above not declared to avoid elections.

[659]

(d) *By the military.**(e) *By riots.†*

[660]

4. *As to the election proceedings.*(a) *As to the writs.*

* In 1645 (4 Journ. 346.), the House of Commons came to the following resolution: "That this House doth declare and order, that all elections of any knight, citizen, or Burgess, to serve in parliament, be made, without interruption or molestation, by any commander, governor, officer, or solicitor, that hath not, in the county, city, or borough, respectively, right of electing." The object of this resolution has been further effectually enforced by the statute 8 Geo. 2. c. 30. which recites that, by the ancient common law, all elections ought to be free; and also recites the statute of 3 Ed. 1. c. 5; and that the freedom of election of members to serve in parliament is of the utmost consequence to the preservation of the rights and liberties of this kingdom; and that it had been the usage and practice, to cause any regiment, troop, or company, or any number of soldiers, which had been quartered in any city, borough, town, or place, where any election of members to serve in parliament had been appointed, to remove and continue out of the same during the time of such election, except as in the particular cases in the act specified. And thereupon, in order that that usage and practice may be settled and established for the future, that act requires that, whenever any election of any members to serve in parliament shall be appointed to be made, the secretary at war, or in case there shall be no secretary at war, the person officiating in his place, shall, at some convenient time before the day appointed at such election, issue proper orders in writing for the removal of every regiment, troop, or company, or other number of soldiers, which shall be quartered or billeted in any place where any such election shall be appointed to be made, out of such places, one day at least before the day appointed for such election, to the distance of two or more miles from such place, and not to make any nearer approach to such place, until one day at the least after the poll shall be ended, and the poll-books closed; and this is to be done by the secretary, under penalty of forfeiting his office, with incapacity of holding any other, upon conviction. But in the case of a particular vacancy during the existence of parliament, he is not subject to the penalty, unless he has received notice of the vacancy by the officer making out the new writ; vide 3 Ed. 1. c. 5. An exception to the general operation of the act is made by s. 3. whereby it is not to extend, or be construed to extend, to the city and liberty of Westminster, nor to the borough of Southwark, in respect of the guards of his Majesty, nor to any place where his Majesty, or any of his royal family, shall happen to be or reside at the time of such election, in respect of such troops as shall be attendant as guards to his Majesty, or such other person of the royal family; nor, by the same clause, is the act to extend to any castle, fort, or fortified place, where any garrison is usually kept, in respect of the troops composing such garrison; 51 Journ. 783. By s. 4. a provision is made, that the act is not to extend to any officer or soldier having a vote at any such election; but that such person may attend the same and give his vote, notwithstanding that act. In extreme cases, but in such cases only, the absolute inefficiency of all other means may create a necessity for military aid. Under particular circumstances, the legislature hath witholden the operation of the law with respect to the removal of the military. This however, has only been done where an adherence thereto would, upon collateral grounds, have been attendant with imminent danger; and these acts of parliament have been passed for a specific purpose, and only for a limited time. This was done with respect to elections at Winchester and Shrewsbury, during the time of the confinement of a number of prisoners of war at each of these places, which would have rendered it dangerous to the neighborhood and to the public that the troops stationed there should have been removed.

† The interruption of the proceedings of an election by riot and tumult is a great violation of the freedom of elections; wherefore, and as such interruption will have the effect of impugning the return, it is highly important to prevent and repress any tendency to a breach of the law in this particular. It is the duty, not only (as will be seen) of the returning officer to do his utmost to carry into effect the exigency of the writ, and therefore, to resist any interruption to the proceedings thereunder; but it is also the duty of magistrates, whether applied to or not, to assist in preserving the public peace. There being a responsibility to the House of Commons, in respect of the proceedings at the election, such proceedings are under their particular superintendence and protection, resort to which may be had in cases of difficulty (immediately, if they are sitting), in addition to the ordinary aid and powers of the law; 32 Journ. 95. It only remains to observe that, wherever there has been an interruption of the proceedings by riot and tumult, notwithstanding that the returning officer has been able to continue and finish the poll, and to comply with the exigency of the writ, by the return of the members, the election has been holden totally void; but, in a case where the riot which prevailed after the close of the poll, and before the making of the return, was found to have been contrived and promoted by the sitting member, whose return, was executed by the returning officer under compulsion, when he was about to return the opposite candidate, the candidate who so ought to have been returned, and who had the majority of votes, was seated; 14 Journ. 24. But in order to make the election void, it must appear that the riot and disturbance was such as really to interrupt the proceedings, inasmuch as otherwise it cannot be considered that the freedom of election has been violated; 10 Journ. 254.

(a 1) *As to issuing it upon summoning a new parliament.**(b 1) *As to issuing it on a vacancy.†*

[661]

* The writs which are issued for the election of members of parliament issue under different authorities upon a general election and upon the vacancy of particular seats during the continuance of a parliament. The writs are made out by the clerk of the petty bag in Chancery, and directed respectively to the sheriffs of counties, and of cities, towns or boroughs, which are counties of themselves; to the "Chancellor of the county palatine of Lancaster, or to his lieutenant or deputy there," to the "Chamberlain of the county palatine of Chester, his lieutenant or deputy; 34 & 35 H. 8. c. 13. see App.; to the "Bishop of Durham, or to his chancellor in temporalities of the county palatine of Durham," 25 Car. 2. c. 9. see App.; to the "Constable of the Castle of Dover, and warden of the cinque ports, or to his lieutenant or deputy there." Between the issuing and return of the writs of summons upon any new parliament, there are at least forty days, both by the magna charta of King John, and subsequently by the above statute of 7 & 8 W. 3. c. 25. s. 1. In practice however, fifty days intervene, in consequence of the 23d article in the treaty of union with Scotland, by which Queen Anne was limited in the power of calling the first parliament after the union to a period not less than fifty days from the date of the proclamation for assembling it.

† All writs for election upon vacancies emanate from the House of Commons, and under that authority, communicated by warrant from the speaker, are made out by the clerk of the crown in Chancery. Inconvenience being felt from the circumstance, that when vacancies happened during a recess of parliament, the new writs could not be issued until the meeting of the house, provisions were made by the statutes 10 Geo. 3. c. 41. and 15 Geo. 3. c. 36. to enable the speaker to make out new writs in the room of members dying, or becoming peers, during such recess. These provisions for the purpose of reducing them into one act, and extending them, were repealed by the statute 24 Geo. 3. c. 26. That statute by sec. 1. reciting the statutes of the 10 & 24 Geo. 3. and that they had been found highly advantageous to the public, by causing speedy elections of members of the House of Commons; and the expediency that the provisions therein contained should be further extended, and freed from certain of the restrictions in those acts specified; and that further provisions should be made for carrying the said powers into execution, in the cases of the death of the speaker, or of his seat becoming vacant, or of his absence out of the realm, and that it would be convenient that the provisions contained in those two acts should be reduced into one act, and that for that purpose those provisions contained in the said two acts should be repealed, repeals the former of the two acts, and so much of the latter as enabled the speaker to issue his warrants to make out new writs for the election of members to serve in parliament. The same act, by section 2, empowers and requires the speaker, during any recess of the house, whether by prorogation or adjournment, to issue his warrant to the clerk of the crown to make out a new writ for electing a member of the House of Commons in the room of any member dying, or becoming a peer of Great Britain, either during such recess or previous thereto, as soon as he shall receive notice, by a certificate under the hands of two members of the House of Commons, of the death of such member: or that a writ of summons has been issued, under the Great Seal of Great Britain, to summon such peer to parliament; the certificate to be in the form or effect, comprised in the schedule to that act, s. 3. directs the speaker, after receiving such certificate, to cause notice thereof to be inserted in the London Gazette, and not to issue his warrant until after the insertion of such notice. By s. 4. the speaker is not to issue such warrant, unless the return of the writ (by virtue of which the member deceased or becoming a peer was elected) shall have been brought into the office of the clerk of the crown, fifteen days at the least before the end of the last sitting of the house, immediately preceding the time when such application shall be made to the speaker to issue such warrant: nor unless such application shall be made so long before the then next meeting of the house for the dispatch of business, so that the writ for the election may be issued before the day of such next meeting; nor in case such application shall be made with respect to any seat vacated, in either of the methods before-mentioned, by any member, against whose election or return a petition was depending at the time of the then last prorogation or adjournment of the house. By s. 5. to prevent any impediment to execution of the act, by the death of the speaker, or by his seat becoming vacant, or by his absence out of the realm, the then speaker was empowered and required within a convenient time after the passing of the act, and so every future speaker, within a convenient time after he shall be in that office, at the beginning of any parliament, by any instrument in writing under his hand and seal, to nominate and appoint a certain number of members of the House of Commons, not more than seven, nor less than three, authorising them, or any one of them, to execute the powers given to the speaker for the time being, for issuing such warrants, subject to the regulations and exceptions in the act; which instrument is, notwithstanding the death of such speaker, or the vacating his seat in parliament, to be in force until the dissolution of the parliament in which it is made. By s. 6. as often as the number of persons so to be appointed shall, by death, or by their seats in parliament being vacated, be reduced to less than three, a new appointment may be made in the same manner. By s. 7. every such appointment is to be entered in the journals, and to be published once in the London Gazette; the instrument is to be preserved by the clerk of the house, and a duplicate is to be filed in the office of the clerk of the crown, in Chancery. By s. 8. the act is not to extend, or be construed to extend, to give any power or

ELECTION.—*As to the Precept.*

[662]

[663]

- (c 1) *As to its delivery.**
 (b) *As to the precept.†*
 (c) *As to the notice of the election.*
 (a 1) *For counties.‡*
 (b 1) *For places being counties of themselves.§*
 (c 1) *For boroughs and towns.||*

authority to any person so to be nominated and appointed, except in the case of their being no speaker, or of his absence out of the realm; nor for any longer time than the person so to be appointed shall continue a member of the house. By s. 9. the publisher of the Gazette, when any such notice of issuing any such warrant shall be brought to him, signed by any person so appointed, is to give a receipt for the same, specifying the day and hour when it was received; and, in case more than one such notice shall be brought to him relative to the same election, he is to insert in the Gazette only the notice first received. The provisions of this act do not operate, except upon vacancies, upon death of members, or their becoming peers. The issuing writs upon vacating a seat upon any other ground does not take place, except upon motion made in the house. There is no precise interval fixed by law between the issuing and return of the writs issued on vacancies; nor any day mentioned in the writ, whereupon the member to be returned is to attend in parliament.

* The statute 7 & 8 W. 3. c. 25. s. 1, directed that the writs should be delivered to the proper officer to whom the execution belonged, and to no other person; but not how the writs were to be delivered; and various frauds were practised by interested persons, who obtained them to deliver them to the officer, and delayed doing so till it suited their convenience that the election should commence. Any means however might have been selected, of sending them to the returning officer, excepting transmission by a candidate. But all difficulties are now removed by the statute 53 Geo. 3. c. 89. which requires the writs to be conveyed by the post, and prescribes certain regulations for their delivery at the post office, and transmission to the proper officers, to whom they are directed. The writs to the Sheriffs of London and Middlesex are to be delivered at their offices by the messenger of the Great Seal; 53 Geo. 2. c. 89. s. 1: so to any other sheriff or officer to whom writs are to be delivered, whose office is in London, Westminster, or Southwark, or within five miles thereof; *ibid.* s. 3.

† The writ is uniformly the origin of the authority from the Great Seal for the election of members of parliament; but the officer to whom the writ is directed and delivered is, with the exception of the case of an election for a county (other than for a county palatine), or for a city, town, or borough, being a county of itself, not the person who superintends the election to be holden under such writ. Therefore in these cases of the counties palatine, and of the cinque ports, the whole exigency of the writ is delegated by such officer to some other quarter, for the purpose of its being carried into effect; and in other cases, so much of it as regards the election of citizens and burgesses.

As soon as the sheriff receives the writ, he should indorse thereon the day of receiving it, 7 & 8 W. 3. c. 25. s. 1; 53 Geo. 3. c. 89; 23 Hen. 6. c. 14; and give a receipt in writing to the person appointed to deliver it, specifying the day and hour of the delivery, and immediately make out the precepts; and within three days after cause them to be delivered to the proper returning officers of the boroughs and towns within his jurisdiction, without fee; 7 & 8 W. 3. c. 25. s. 1; 53 Geo. 3. c. 89; 23 Hen. 6. c. 14. The officer of the cinque ports is allowed six days for delivering the precept after the receipt of the writ; 10 & 11 W. 3. c. 7. s. 2.

‡ By 7 & 8 W. 3. c. 25. s. 3. and 18 Geo. 2. c. 18 s. 10. the election for knights of the shire was to be holden at the county court, and provision was made for its adjournment within a limited period for that purpose. But now a special court is to be holden for such election, and proclamation of holding it is to be made within two days after the receipt of the writ at the place where the election is to be holden, 25 Geo. 3. c. 84. s. 3; that is, at the most usual place of election for the last forty years; 7 & 8 W. 3. c. 25. s. 3. It must not be holden on Sunday, nor more than sixteen nor less than ten days from the day of proclamation, *ibid.*; the proclamation must be made between eight o'clock in the morning and four in the evening, from the 25th of October to the 25th of March, and between eight o'clock and six the rest of the year, 33 Geo. 3. c. 64.

§ In a city or town, which is a county of itself, where the election is holden by virtue of a writ directed immediately to the returning officer, he should upon the receipt of the writ, after indorsing the day on which he receives it, and giving a memorandum of the receipt to the postmaster who delivers it, 7 & 8 W. 3. c. 25. s. 1; 53 Geo. 3. c. 89, cause public notice to be given of the time and place of election, which must be holden within eight days, and after three days from the receipt of the writ; 19 Geo. 2. c. 28. s. 7.

|| The returning officer, as soon as the precept is delivered to him, upon the back of the same precept shall indorse the day of the receipt thereof, in the presence of the party from whom he received it, and forthwith cause public notice to be given of the time and place of election, and proceed to election thereon, within the space of eight days, and give four day's notice, at least, of the day appointed for the election; 7 & 8 W. 3. c. 25. s. 1. Of the four days required for notice, one must be reckoned exclusive, Chichester, 17 Journ. 137; 2 Hey. 156; and the consent of the candidates will not cure an insufficient notice in

(d) *As to the place of election.*(a 1) *For counties.**(b 1) *For other places.†*(c) *As to the day of election.‡*(f) *As to the erection of booths.§*

[664]

(g) *As to officer's duty previous to the demand of a poll, and term of the demand of a poll, and the appointment of sub-sheriffs, poll clerks, &c.||*

that respect, but such defective notice will avoid the election; *Seaford*, 3 *Lad.* 3; 2 *Hey.* 169. Nor can the returning officer extend the time of holding the election beyond the eight days mentioned in the statute; *sed vide* 2 *Hey.* 160. In consequence of great corruption being disclosed in New Shoreham, Cricklade, and Aylesbury, three statutes were passed to extend the right of voting for those places by which the notices are respectively regulated; 11 *Geo.* 3. c. 55. s. 5; 22 *Geo.* 3. c. 31. s. 5; 44 *Geo.* 3. c. 60. s. 4.

* By the common law, the election might have been at any place within the county, there being no restriction herein upon the sheriff as to his County Court. In particular counties, the place for holding such courts was fixed by several early statutes; but there was no general provision until that of the statute 7 & 8 *W.* 3. c. 25. s. 3 and which directs that at every such election the sheriff shall hold his County Court at the most public and usual place within the county, and where the same has been most usually holden for forty years last past. This statute is only directory; and although the non-observance of it will subject the sheriff to answer for a breach of his duty, yet in a case where this requisition had not been complied with the election was nevertheless holden to be valid; see *Roe on Elections* p. 517.

† With respect to elections for places being counties of themselves, and for other places, there is no positive provision of the law as to where the elections are to be holden. It should seem that the election ought to be within the place to be represented; but that, with that qualification, the returning officer may use his own discretion; in this however, as in other points, any departure from the usual practice is an act attended with responsibility, and it will behove him, if he do so, to be prepared to show that he had good grounds for such proceeding. Elections for cities and boroughs in Wales and Monmouthshire are, by the statute 35 *H.* 8. c. 11. s. 3. to be at lawful and reasonable places; but there is no further definition of the intent of the law; see *Roe on Elections*, p. 521.

‡ *Vide ante*, p. 660. n.

§ When there is reason to expect a contest at an election, where the electors are very numerous, it is usual, as a preliminary step for the convenience of all parties, for the candidates to cause booths to be erected for the purpose of taking the poll.

The number of booths should correspond with the number of lathes, &c. in the county, not however, in any case exceeding fifteen; and in each booth the name of the lath or division to which it is appropriated should be affixed: a poll clerk is to be appointed for each booth, and lists of the towns, &c. within each division, to which a particular booth is appropriated, made out, and copies taken to be delivered to the candidates upon request: 18 *Geo.* 2. c. 18. s. 7. With respect to other elections, with the exception of the case of Westminster, which has been recently provided for, 51 *Geo.* 3. c. 126. there is no general provision for the erection of booths for taking the poll. However convenient it may be that such arrangement should be made, it can only be adopted by agreement of the candidates, the law leaving it to their discretion to act herein as they shall be advised, and imposing no liability upon them to defray such expenses, unless they shall accede to the measure; neither will the law infer any such liability from usage, however long and continued.

|| On the day appointed for the election, and at a seasonable hour, 23 *Hen.* 6. c. 14. which for counties is between eight and eleven, the returning officer opens the proceedings, after proclamation for silence is made, by reading the writ of summons, if the election be for a county, or city, or town which is a county of itself; or the precept, if it be for a borough, &c. Where the election is made by virtue of a precept, he should then take and subscribe the bribery oath, which may be administered by a justice of the peace of the county, if at a county election of the borough; if at a borough election, or in the absence of the justice of the peace, by any three electors; 2 *Geo.* 2. c. 24. s. 3. and read, or cause to be read, the bribery act; *ibid.* s. 9. If the election is for a place where the franchise is in the whole, or in part in freemen, the Durham act, as it is called, "An act to prevent occasional freemen from voting," must be read next; 3 *Geo.* 3. c. 35. And at New Shoreham, Cricklade, Aylesbury, the statutes particularly relating to those places; 11 *Geo.* 3. c. 55; 22 *Geo.* 3. c. 31; 44 *Geo.* 3. c. 60. He is then to call upon the electors to name the candidates. After the candidates are nominated, each may be called upon by the other, or by two electors, to take the qualification oath, 9 *Ann.* c. 5. s. 5. unless it is rendered unnecessary by any of the exceptions in the statute of *Ann.* c. 5; see *ante*, &c. Qualifications of a member. If no more candidates are named than the legal number of representatives, the returning officer has no authority to open a poll to allow time for the appearance of another candidate, *Nottingham*. 1 *Peck*, 815; but should return those nominated as duly elected; see *Shepherd on Election*, p. 66, &c. The election is made by the

[665]

*(h) As to proceedings during the poll.**

view, when the inclination of the electors is taken by the voices, by holding up of hands; or by sometimes collecting the friends of the respective candidates into separate bodies. And if no poll be demanded, an election so determined will be sufficient; *Whitel. 393*. The election is made by the poll when the voices are taken, or votes numbered man by man; and if a poll be legally demanded, the returning officer is bound to grant it; *1 Journ. 802*. A poll must be demanded by a candidate, or by an elector, but it seems from the case of *Leominster, 2^d of March, 1662*, that if a demand of a poll be made by a candidate who shall turn out to be ineligible, the refusal to him will not avoid the election; *8 Journ. 392*. It must also be demanded in due time, that is, before the majority is declared upon the view, or within a reasonable time afterwards; *1 Jour. 468; 8 id. 280*. A poll must not be demanded in a partial or qualified manner, it must be demanded generally, as to all the electors; *Glanv. 104*.

* When a poll has been demanded, the returning officer is, in consequence, called upon to enter upon a most important duty, that of receiving the votes of the electors, whereupon he is afterwards to found the return. The order of proceeding in taking the poll has been marked out by the two statutes of the 7 & 8 W. 3. c. 25. and that of the 25 G. 3. c. 84. By the stat. 7 & 8 W. 3. c. 25. s. 3. upon a poll required, it was to be proceeded in forthwith, in some open or public place, to be appointed according to the directions of that act. That statute only applied to elections for knights of shires; but now, at such election, or at any other, when a poll is demanded, it is by the stat. 25 G. 3. c. 84. s. 1. to commence on the day upon which it is demanded, or upon the next day at furthest, unless it be upon Sunday, and then upon the following day. At the time thus appointed by law, the returning officer proceeds to open the poll; if, after demand of poll, no electors come forward within a reasonable time, returning officer may then make the return forthwith; *8 Journ. 286*. With respect to elections for London, an enactment had been made, regulating the commencement of the poll by the stat. 11 G. 1. c. 18. s. 4. which is similar to that above stated in the 25 G. 3; the latter act has an exception, by s. 9. which would make it questionable whether the case of any such election is within its operation. The poll must commence on the day it is demanded, or the day after, unless that be a Sunday, and be continued daily, with the exception of the Sundays. It may not be kept open more days than fifteen, and if kept open on the fifteenth day, it must close at 8 o'clock, *25 G. 2. c. 84. s. 1; 7 & 8 W. 3. c. 25. s. 5*; it should be kept open seven hours, between 8 o'clock and 4, in each day subsequent to the first; *25 G. 3. c. 84. s. 16*. At the election for the county of Southampton, the sheriff, at the request of a candidate, is bound to adjourn the poll after its close at Winchester to Newport, in the Isle of Wight; *1 Hey. 407; Gloster, 32*.

As there are certain oaths and declarations which electors may be required to take previous to their polling, and much inconvenience was found to arise from the time consumed in administering them, the returning officer is authorised by several statutes, *34 G. 8. c. 73; 42 G. 2. c. 62; 43 G. 3. c. 74*. after a poll shall be demanded, to appoint, at the request in writing of a candidate, commissioners, who are to administer all, except the bribery oath, at a separate place or places whilst the election is proceeding, giving to each elector who shall have taken the oath, a certificate thereof, to be produced to the officer or clerk taking the poll. As this request, if made three days previous to the election, obliges the returning officer to provide numerous booths for this purpose, particularly described in the statute *34 G. 3. c. 73. s. 6*. where a contest is expected, he should be provided for such a demand. The bribery oath must be taken at the poll before the returning officer, *43 G. 3. c. 74*; but it may be taken at any time during the election; a refusal at one period does not preclude a voter from taking it subsequently; *Gloster, 30*. The other oaths are of allegiance, or supremacy, *7 & 8 W. 3. c. 27. s. 39; 1 G. 1. s. 2. c. 13*; of abjuration; *6 Anne, c. 23; 6 G. 3. c. 53*. The freeholders' qualification oath for counties, *18 G. 2. c. 18. s. 1*; for cities, and for towns being counties of themselves, *19 G. 2. c. 28*; and where from the nature of the right of election, no oath of qualification by estate can be taken, an oath of residence or abode is required; *25 G. 2. c. 84. s. 5*. The form of this last oath may be qualified, by adding another place of abode to the one which entitles the elector to vote; as, where *Harwich* being the borough for which the election was held, the voter tendered his oath to this effect: "place of my abode at *Durham*, and also in *West-street*, in the borough of *Harwich*;" *1 Peck. 390*. In *London*, *11 G. 1. c. 18*; *Norwich*, *2 G. 2. c. 8*; and *Coventry*, *21 G. 3. c. 54. s. 7*; particular oaths are required from the freemen. Although the regulations prescribed by the statutes for the manner of conducting the election ought to be complied with, yet a deviation from such as are merely directory will not avoid the election, though it may subject the returning officer to censure from the house. Thus, where the mayor refused to swear the poll-clerks, according to the *25 G. 3. c. 84. s. 7*. and on the third day adjourned the poll, after it had been opened one hour, and held a court for the admission of freemen, who polled the next day; though these acts were signified by the committee to be illegal, yet they did not avoid the election, the statute being considered directory; *Colchester, 1 Peck. 506*. Formerly, a voter was not required to mention his name when he voted; but now it must be stated to the poll-clerk, that it may be properly entered. And a mere declaration in the booth, for whom the voter gives his

(j) *As to proceedings upon close of the poll.**

[666]

suffrage, is not sufficient, it must be regularly tendered to the poll-clerk, 1 Hey. 407; Gloster, 32; and in the proper booth, *ibid.* 401: but if the vote is received in the wrong booth by mistake of the poll-clerk, it will not be set aside. It is very material that the vote should be regularly tendered; for, if it be subsequently disputed upon a petition, the committee will require proof of a proper tender, before they will admit evidence to establish the right of voting; Gloster, 30; Horsham, 2 Fras. 35; 2 Orme, 423. A county voter should state correctly to the poll-clerk the kind of estate for which he votes, its situation, and where assessed, the name of the tenant if there be one, and in his own residence; and one who polls in a different right from that which really gives him the franchise will, upon petition, be struck off the poll; Simeon, 136. A person entitled to a double vote must poll for both candidates at the same time; 1 Peck. 109. There are certain general rules which should be given for his decisions upon the reception of votes; he should receive or reject them, according to the last determination of the house upon the right of election; 7 & 8 W. 3. c. 7: 2 G. 2. c. 24. s. 4; 2 Fras. 144; see 28 G. 3. c. 52. s. 31; and where there is no last determination, according to the usage of the place, (Glan. 107, 108. 142; *sed, vid.* Brady, 127. 464.) and where there is no custom or prescription, according to common right, Glan. 107. 108. 442; *sed, vid.* Brady, 127. 164. which is to the extension of the franchise; nor can the agreement of candidates alter the law, or justify the officer in a contrary decision; Glan. 107, 108. 143; *sed, vid.* Brady, 127. 164. Where he has doubts as to the rights of single voters, or of a particular class; or an objection is made; which, if argued, would greatly interfere with the proceedings, he may reserve the consideration until a future time during the poll, or till a reasonable time after its close, making them upon the poll; Bedford 1 Lud. 350; Carmarthen, 1 Peck, 287; Middlesex, 2 Peck, 338. It was once resolved, that if the voters were equal, the electors "should continue together, or meet by adjournment, till they can agree to an election by plurality of voices;" for the returning officer has no casting voice, unless by charter or custom; Winchelsea, Glanv. 21; Michael, 1 Lud. 77. But an equality of voices makes a void election, and upon such an occasion there may be a double return; 1 Heyw. 604; 8 Burn. 13; 10 Burr. 132. A voter however, who has polled at the beginning of the election, may, if

* The next duty of the returning officer, upon the close of the poll, is to declare the majority; this is done either immediately, or after an adjournment. The latter course is generally adopted where the numbers upon the poll are considerable, or there are any queried votes to be decided, an adjournment being generally necessary. To the period of such adjournment until the 25 Geo. 2. c. 84. there was no restriction, except that which, in the case of a new parliament, arose from the necessity of returning the writ at a given day. Under that statute alluded to, a returning officer has now but little discretion, being required by sec. 1 immediately, or on the day next after the final close of the poll, truly, fairly, and publicly to declare the name or names of the person or persons having the majority of votes on the poll. With respect to elections for London, the 11 Geo. 1. c. 18. s. 4. directs, that when the poll is finished, the poll-books having been sealed, and afterwards opened, according to the directions of that act, they shall be cast up, and within two days afterwards the numbers of the votes for each candidate shall be declared to the electors, at the place of election; see Roe on Elections, p. 696. In the declaration of the numbers, the duty of the returning officer is purely ministerial, and he is to act according to the existing numbers at the time of such declaration, without reference to the validity or invalidity of the votes; having once admitted them as good, he is bound so to consider them, except he shall rescind his judgment in a formal reconsideration of the poll by way of scrutiny; 2 Peck. 338. A scrutiny is a general reconsideration by the returning officer, either of the poll altogether, or as between particular candidates, for the purpose of maturely examining the validity of the votes, or the grounds of claims respectively received or rejected, and of amending it by the correction of decisions either way which should prove to have been erroneous; see Roe on Elections, p. 698. It has always been, and continues (with the exception of the case of elections for London,) to be discretionary in the returning officer to grant or refuse a scrutiny, nor has there been any inclination in the house nicely to question the exercise of this discretion; *ibid.* 699. No particular time is assigned within which a scrutiny is to be demanded; but as the return is to be made forthwith, and as it seems necessary that there should be an adjournment, it would be prudent in a party intending to apply for a scrutiny, to make the demand either when the members are about to be declared, or immediately thereupon. If, upon the demand of a scrutiny, the returning officer deem it proper to grant it, an adjournment should be made of the election proceedings to a proper time and place; Roe on Elections, p. 701. If a scrutiny be granted, the return must nevertheless be made, as to a county election, on or before the day on which the writ is returnable; and for a borough election the precept must be returned to the sheriff six days before the return of the writ, 25 Geo. 3. c. 84. s. 1; and when the election takes place to supply a vacancy during the existence of parliament, within thirty days after the close of the poll. Evidence may be received upon oath, during a scrutiny, touching the rights of disputed voters, from all persons consenting to take the oath; *ibid.* s. 6. And the votes must be decided upon alternately (s. 2); Shepherd on Elections, p. 96.

[667]
[668]

(k) *As to the custody of the poll-books.**

(l) *As to the return to the writ.†*

the voters prove equal, for the purpose of making the election good, withdraw his vote, and give it to the other candidate, that one may have a majority; Glanv. 22; see Roe and Shepherd, on Elections.

As to the manner of taking the poll in elections for counties, poll clerks are to be appointed and sworn at the expense of the candidates, and inspectors allowed with a check-book for each poll book, 7 & 8 W. 3. c. 25. s. 3; 25 G. 3. c. 84. s. 7; 18 G. 2. c. 18. s. 9; and the same for the city of Westminster (51 G. 3. c. 126; 53 G. 3. c. 152. These statutes have expired.) The poll clerks in county elections are to set down the name of each freeholder, the situation of his freehold, and for whom he polls, 7 & 8 W. 3. c. 25. s. 4; the place of his abode, 10 Anne, c. 23. s. 5. and to poll no one who is not sworn, if required to be sworn by a candidate, and to enter jurat against the names of such as are sworn, 10 Anne, c. 23. s. 5; nor can he receive votes for any freehold out of the district in his list, unless it lies in some district not mentioned in any of the lists, 18 G. 2. c. 18. s. 8. In elections for cities and towns, being counties of themselves, cheque-books are allowed, but no mention is made of inspectors; 19 G. 2. c. 28. s. 6. In elections for boroughs and towns, there is no provision by statute, for either cheque-books or inspectors, but the poll-clerks are to be sworn (25 G. 3. c. 84. s. 7) to the performance of their duty, which is to set down the name of each voter, his addition, profession, &c. the place of his abode, for whom he shall poll, and to poll only such as have taken the oath or affirmation required by any statute.

As to the continuance of the poll, it remains to observe that, as the electors are not compellable to give their suffrages at any particular time, or at all, it must necessarily be left to the discretion of the returning officer, regulated by custom, to determine what time he will allow towards the end of the poll for taking the remaining votes. In general, when the electors unpoll are reduced to a small number, the returning officer gives notice, that at an appointed hour he will proceed to make the ordinary proclamations for the close of the poll. These proclamations are usually three in number, and made at short intervals from each other, purporting that the poll will be finally closed at a certain time; proclamations therefore, may be considered as necessary, whenever the returning officer proceeds to close the poll before the expiration of the full time allowed by the statute, but not when the poll is protracted to the last hour, when the law steps in to determine it by virtue of the 25th Geo. 3. c. 84. which enacts that no poll shall continue more than fifteen days at most. And by the same clause, if the poll shall continue until the fifteenth day, it is in such case to be finally closed at or before three in the afternoon of that day. With respect to elections for the county of Southampton, the poll at Winchester is, by the stat. 25 G. 3. c. 84. s. 16. to be closed within fifteen days at the most; and the adjourned poll at Newport having commenced, is to continue not longer than three days at the most. With respect to elections for London, by the 11 G. 1. c. 18. s. 4. the poll is to be finished within seven days, excluding Sunday; see Roe, on Elections, p. 683.

* With respect to the poll-books at elections for knights of shires, the 10 Ann. c. 23. s. 5. directs the sheriff or returning officer, within the space of 20 days after the election, faithfully to deliver over upon oath (to be administered as therein) to the clerk of the peace of the county, all the poll-books of the election, without embezzlement or alteration; and by the same clause in counties, where there are more than one clerk of the peace, the original poll-books of the election, without embezzlement or alteration, and by the same clause in counties, where there are more than one clerk of the peace, the original poll-books are to be delivered to one of such clerks of the peace, and attested copies thereof to the rest. The poll-books so delivered are to be carefully kept and preserved among the records of the sessions of the county.

With respect to other elections, there is no statutory provisions for the preservation of the poll-book. But it is frequently of great moment, with a view to any subsequent inquiry, to ascertain correctly the contents of the poll-book; the law has therefore, made a provision, by the 7 & 8 W. 3. c. 25. s. 6. directing that every returning officer shall deliver, to any person or persons who shall desire it, a copy of the poll, paying only a reasonable charge for writing the same, and this under penalty of 500*l.* to the party grieved; see Roe on Elections. 707.

In conformity with these provisions, it has been decided that an action of debt lies against a returning officer at an election for 500*l.* penalty, under the statute 7 & 8 W. 3. c. 25. s. 6. for not delivering a copy of the poll to a candidate on being required; 1 Bro. P. C. 605.

† The return to the writ is by indenture between the sheriff and the electors; the return to the precept by indentures between the returning officer and electors on the one part, and the sheriff on the other; it must be remitted with the precept to the sheriff, who remits it, as well as his own return, with the writ appended, to the clerk of the crown in Chancery; 7 H. 4. c. 15; 23 H. 6. c. 14. As the precept should be directed and delivered to the legal returning officer of the borough, so he is the proper person to make the return to the sheriff; Shepherd on Elections, p. 77. A return made by the proper officer, though defect-

(5) *As to proceedings upon controverted elections.**(a) *Petitions.†*(b) *Petitions.*

[669]

(a 1) *Form of.‡*

ive in form, will be sustained; Orme, 103. And a return by an officer *de facto*, although he may not have complied with all the legal forms necessary to sustain his election to the office, upon a *quo warranto*, is nevertheless a good return, Doug. 568; though a double return, if wilful, false, and malicious, is prohibited, 7 & 8 W. 3. c. 7. s. 3; yet there are many cases where double returns are justifiable and necessary: as where the right of election is uncertain, and the officer will not take upon himself to decide it, circumstances may occur to make a special return necessary, as a riotous obstruction to the execution of the writ or precept; 2 Peck. 383. But the necessity for such special return must be very apparent to justify the officer.

* In the latter part of the reign of Elizabeth and the beginning of that of James the First, the House of Commons made the first attempt to assert the exclusive right of determining the merits of controverted elections of their own members; Shepherd on Elections, p. 79.

† There are six different sorts of petitions referred to a select committee:—1st. Against the election; 2nd. Against the return, 10 Geo. 3. c. 16; 3rd. Complaining that no return has been made; or, 4th. That an insufficient return has been made, 25 Geo. 3. c. 84. s. 10; 5th. To oppose the right of election, or of appointing returning officers, determined by a select committee, and reported to the House; 6th. To defend such right, 28 G. 3. c. 52. s. 26. 29. The first four may be subscribed by any person claiming to have a right to vote at the election, or to have been returned, or alleging himself to have been a candidate; the two last may be subscribed by all persons; *ibid.* s. 1. But though every person claiming a right to vote may petition the House, yet care should be taken that no voter, whose evidence is wanted on the trial, be a subscribing party, since no party to a petition can be a witness in support of it. There is also another kind of petition, which may be addressed to the House by one claiming a right to vote, but is not referred to a committee; viz. to be admitted as a party in the room of a sitting member, or one returned upon a double return, who declines defending his election or return, or is prevented doing so by death, advancement to the peerage, or his seat being declared vacant; *ibid.* 18. 26. 29. If a petition presented to the house is not taken into consideration during the same session, a renewed petition, which must contain no new allegation, nor be signed by other parties than those who signed the first (3 Doug. Pref. ix.), should be presented the next and every subsequent session till it is disposed of, within fourteen days from the commencement of the session; 28 G. 3. c. 52. s. 5; 34 Geo. 3. c. 83.

‡ Although there are no technical forms necessary to be adhered to in framing a petition to the House of Commons, it is nevertheless requisite to state, with certainty, such facts as are intended to be relied on in evidence, in order that the party or parties whose interest it is to disprove such facts may have sufficient notice of the charges made against them. Thus, it is not competent to a petitioner to prove, as matter of complaint, such facts as are introduced into the petition as matter of recital, nor when specific charges are made against a returning officer is it competent to enter into evidence of other charges not alleged; moreover, it is necessary, in compliance with the statute 28 Geo. 3. c. 52. for the petitioner to state his title to petition the House; for except in the cases of petitions of appeal, to which that branch of the statute does not apply, it is directed, that no petition shall be proceeded upon unless the same shall be subscribed by some person or persons claiming therein to have a right to vote at the election to which the same shall relate, or to have a right to be returned as duly elected thereat, or alleging himself or themselves to have been a candidate or candidates at such election, see Rogers on Election, vol. ii. p. 15.

It seems to be sufficient to state, in a petition complaining that the sitting member was not qualified at the time of his election; that he was not "possessed of the requisite estate," the words of the statute of 2 Anne, c. 5. being "seised of, or entitled to." Nor does it seem necessary to allege even a criminal charge in technical phraseology; 4 Doug. 55. But although it is sufficient if a petition be drawn in general terms, yet the thing complained of must be stated in the form of a complaint; 3 Doug. 8; 1 Peck. 285. It seems also, where there is a specific allegation that three votes had been improperly received, a committee will not receive evidence against a fourth under a general charge that the return was brought about by illegal and unwarrantable acts; 3 Luders. 405. Where the petition contains a statement of the facts intended to be proved, it is sufficient, although the ground of complaint, which is the natural results of the facts stated, be nowhere expressly alleged; 1 Luders. 415. It has been stated above, that it is sufficient, even in stating a criminal charge, to aver it in general terms; but it seems that it is advisable, even although the specific grounds of petition intended to be relied upon be expressly averred, to add also general words of complaint; Clifford, 354. In a petition of appeal it is not necessary to state any right of voting in opposition to that reported to the House by the previous committee; but if a petitioner chooses to do so, he is bound by the one stated, and is not at li-

[670]

(b 1) *Presentment of.**(c 1) *Recognizance connected with.†*

berty afterwards, when called upon to deliver in his statement to the committee, to deliver one that varies from the right in his petition; 2 Peck. 278.

* A petition complaining of an undue election or return, or of an insufficient return, or of the omission of a return, must be presented within the time specified in the order of the House, which is passed on the first day of every session, which is limited to within fourteen days after the day of making the order—always the first day of meeting of parliament—or within fourteen days after a new return shall be brought in; see *Rogers on Election*, vol. ii. p. 36.

If parliament is sitting at the time the return is made, the petition must be presented within fourteen days after the return shall be brought in; 1 Doug. 84. But when the House has not sat on the fourteenth day, this rule has received an equitable construction, and petitions have been received on the next days of its sitting, although after the expiration of the fourteen days; 1 Doug. 82; 8 Journ. 394. But where, in consequence of the fourteen days expiring during an adjournment, an application is made to the indulgence of the House to extend the time, and receive the petitions, such petitions must be presented on the first day of the meeting of the House after such adjournment; 38 Journ. 163. Petitions to oppose right are to be presented within six months. If six months expire during the intermediate time between dissolution of old and meeting of new parliaments, then within fourteen days of the day of meeting of new parliament. If they expire during recess, then within fourteen days after next session. If during adjournment of fourteen days, then within fourteen days of first day of meeting of the House; 53 Geo. 3. c. 71. s. 15.

There is, however, no provision contained in the above enactments for a case where the six months expire during an adjournment for a less period than fourteen days, and it is difficult to anticipate how the House would treat such a case. The provision for cases of adjournment for a period not less than fourteen days seems to exclude the House from extending their indulgence to other cases; care should therefore be taken to present the petition in good time; or in case of difficulty, a previous application might be made to the House, and an opinion obtained as to the course which they would be likely to pursue. The time within which a petition may be presented, the prayer of which is to defend any right of election, or any right of choosing, nominating, or appointing returning officers, is almost unlimited. By the 29th section of the 28 Geo. 3. c. 52. it is enacted, "That it shall and may be lawful for any person or persons, at any time before the time appointed for taking such petition (the petition to oppose the right) into consideration, to petition the House to be admitted as a party or parties to defend such right of election, or of nominating, choosing, or appointing returning officers."

† Before any proceeding can be had upon any petition (except petitions to oppose a right), two distinct recognizances are required to be entered into by the petitioners; the first of 200*l.* and two sureties in 100*l.* each, is required by 28 Geo. 3. c. 52. s. 5. in order to compel parties petitioning to appear before the House at such time as shall be fixed by the House for taking the petition into consideration, and to renew it in every subsequent session, until a select committee shall have been appointed by the House, or until it shall have been withdrawn by the permission of the House. The second recognizance is required by the 3rd section of the 53 Geo. 3. c. 71. which, after reciting that it is expedient that provision shall be made to ensure the more punctual payment of all costs, expenses, and fees which may become due to witnesses, officers of the House and parties, by reason of the trial of controverted elections, proceeds to enact, that no proceeding shall be had upon any petition (petitions to approve a right are excluded from the operations of this act also), unless the party signing the petition shall, within a certain time, enter into a recognizance of 1,000*l.*, with two sufficient sureties of 500*l.* each, for the payment of all costs expenses, and fees which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the House upon the trial of the said petition, or to the party who shall appear before the House or committee, in opposition to such petition, in case such person or persons shall fail to appear before the House at such time or times as shall be fixed by the House for taking such petition into consideration, or in case such petition shall be withdrawn by the permission of the House, or in case the House shall report such petition to be frivolous and vexatious. The names of the sureties in this recognizance must be delivered, in writing, to the clerk of the House eight days before it is entered into, 53 Geo. 3. c. 71. s. 3; and if not entered into, the petition will be discharged; *ibid.* The time, however, for entering into these recognizances may be enlarged once, upon sufficient matter properly verified to the House, for a number of days not exceeding thirty; *ibid.* The recognizances are entered into before the Speaker, who appoints two examiners to ascertain the sufficiency of the sureties; 28 Geo. 3. c. 52. s. 6. The recognizances of parties or their sureties, who reside more than 40 miles from London, may be entered into before a magistrate, and the examiners may decide upon their sufficiency by affidavit; 28 Geo. 3. c. 52. s. 7. If the conditions of a recognizance are not satisfied, it will be certified unto the Exchequer by the Speaker, which certificate will have the effect of an escheat; 28 Geo. 3. c. 52. s. 9; 53 Geo. 3. c. 71. ss. 7. 12.

(d 1) *Withdrawing a petition.**

[671]

(c) *Committee.*(a 1) *Proceedings of the house previous to the sitting of the committee.†*(b 1) *Proceedings of the house after the sitting of the committee.‡*

[672]

* Formerly, when a petition complaining of an undue election, or return, of the omission or insufficiency of a return, had been presented, it could not be withdrawn unless it related to the return of a member who had since vacated his seat (28 Geo. 3. c. 52. s. 8.); but now it may be withdrawn upon matter arising since it was presented verified by affidavit to the House: 53 Geo. 3. c. 71. s. 8.

Neither the 28 Geo. 3. however, nor the 53 Geo. 3. apply to cases of petitions of appeal where the question relates to any right of election, or any right of choosing or nominating returning officers; so the right to withdraw petitions of that description, not being affected by either of the statutes, is regulated entirely by the discretion of the House, applied to each particular case, as it may arise; see Rogers on Elections, p. 48.

† On this point, Mr. Shepherd in his Summary of the Law relative to the election of members of parliament, has collected the following remarks. As soon as a petition, complaining of an undue election or return, the omission of a return, or an insufficient one, is presented; 10 Geo. 3. c. 16. s. 1; 25 Geo. 2. c. 84. s. 11; a day and hour is appointed by the house for taking it into consideration, which must not be within fourteen days after the commencement of the session of parliament in which it is presented, nor within fourteen days after the return to which it relates, shall be brought into the office of clerk of the crown; 11 Geo. c. 42. s. 2; 25 Geo. 3. c. 84. s. 11. Notice of the time appointed shall be forthwith given in writing by the "speaker to the petitioners and sitting members or respective agents," (in the case of undue elections or returns), and to the petitioners and to the returning officer or officers by whom such return ought to have been made, or shall have been made (in the case of insufficient or no return), accompanied by an order to attend the house at the time appointed by themselves, counsel, or agent, in order to the appointment of a select committee according to the regulations of the above act; 10 Geo. 3. c. 16. s. 1; 25 Geo. 3. c. 84. s. 10. As to the petition of appeal against the report of a select committee, the time appointed for taking it into consideration must be after forty days from the day it was presented, and notice of the day and hour is inserted in the gazette by order of the speaker, and sent to the sheriff or returning officer, who affixes a copy thereof to the door of county or town-hall, or parish church, nearest the day of election; 28 Geo. 3. c. 52. s. 28. On the day appointed for taking the petition into consideration and before the order of the day is read, the Sergeant at Arms is directed to go with the mace to the places adjacent, and require the attendance of the members; upon his return the house is to be counted, and if there are not 100 members present, to adjourn. If 100 members are present, the parties or agents are ordered to attend, and forty-nine members selected by ballot, which number is afterwards, upon the parties withdrawing from the house, reduced to thirteen, each party striking off one alternately; 10 Geo. 3. c. 16. s. 5. 13. Each party has also a right of specially nominating a member, and these nominees being added to the reduced list, makes the select committee of fifteen; id. s. 11. 13. Where there are more than two parties in distinct interest, the list of forty-nine is reduced by each party alternately, striking off one till thirteen remain, who appoint two nominees to be added to their number; 11 Geo. 3. c. 42. s. 6. 7. If at the day and time appointed no party appears to oppose the petition, the clerk of the house and the petitioner reduce the list to thirteen, the petitioner nominates one of the nominees, and the thirteen members the other; the same mode is pursued where a party opposing the petition waives his right to nominate; 28 Geo. 3. c. 52. s. 13. If the petitioner does not appear within an hour after the time fixed for selecting the committee, the petition is discharged; 28 Geo. 3. c. 52. s. 13. When the fifteen members are thus respectively selected and nominated, they are to be sworn at the table; 10 Geo. 3. c. 16. s. 13; and are then deemed to be legally appointed; 53 Geo. 3. c. 71. s. 18; and are directed by the house to meet at a time within twenty-four hours; 53 Geo. 3. c. 71. s. 18; but they usually meet immediately to elect their chairman and adjourn to the following day; Orme, 355.

* When the committee is assembled to proceed upon the trial of the case, the clerk reads the petition or petitions, the last determination upon the right of election, if there be any, and the standing order of the house, prohibiting the offer of evidence upon the legality of notes, contrary to such determination, January 16, 1735-6. If there be a double return, the resolution of the house, directing the counsel of the person first named in the return, or whose return shall be immediately annexed to the writ, to proceed in the first instance is then read, March, 1727-8. If there be two persons claiming to be returning officer, the resolution of the house relating thereto, if any, is read; Orme, 359. If the case be within 28 Geo. 3. c. 52. s. 25. that in the opinion of the committee the merits of the petition turn wholly or in part upon the right of election, or the right of appointing the returning officer, written statements of such right of election or appointment must next be delivered to the clerk by the parties or their counsel. And although it cannot appear that such rights will be disputed by the sitting member till his case be opened, yet the statement must be delivered in the first instance; 1 Peck, 111. a; vide 2 Peck, 279. a; and the statement of the right should coincide with the claim of right in the petition (Liskeard, 2 Peck, 278); but if

[663]

(6) *Expenses of elections.*

1. MORRIS v. BURDETT. H. T. 1808. K. B. 1 Campb. N. P. C. 218.

A candi-
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ly liable for
such expen-
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Per Lord Ellenborough, C. J. A candidate at an election for members of parliament is liable to no expense, except such as the statute law casts upon him, or he takes upon himself by his express or implied consent. A great at variance with it, and now one may be substituted adapted to the claim in the petition; *ibid.* 279. It seems, however, that the committee are not confined in their decision upon the right of election by the statements of the parties, who may determine the right according to the proof, though varying from that contained in either of the statements; *ibid.* d. n. g.—Where the statements turn the right to make the return conferred by different offices upon the respective holders, as whether the mayor or portreeve has the right of return, the question as to the legal mode of electing individuals to those offices is not raised; vide *Okehampton*, 1 *Fras.* 71; *Taunton*, 1 *Peck*, 432; *Shepherd on Elections*, p. 87.

If the allegations in a petition raise various questions, the committee will sometimes try each question separately, instead of hearing the whole case opened and proved at once, arranging the order of trying the questions in the way most conducive to speedy and correct determination of the case, and this mode has been followed, not only with consent of both parties, *Bristol*, 1 *Doug.* 246 N; *Berwick*, 2 *Doug.* 426; but against the inclination of one, *Seaford*, 3 *Lud.* 35; *Honiton*, 3 *Lud.* 164; though in some instances, where the separate decision of one question would not have determined the cause, the committee have refused to separate the case, contrary to the wishes of one of the parties; *Downton*, 3 *Lud.* 176; *Steyning*, 2 *Fras.* 403. 407. In controverted elections for counties in England and Wales, lists of the voters intended to be objected to were required, by an annual resolution of the house, to be mutually delivered by the petitioners and sitting members to each other, giving the several heads of objection, and distinguishing the same against the names of the voters intended to be opposed; and now, by stat. 53 G. 3. c. 71. it is required that, in all controverted elections or returns for Great Britain, all the parties complaining or defending, shall deliver such lists to the clerk of the house, to be kept in his office for the inspection of all parties concerned; *Shepherd on Elections*, p. 93.

The candidates at the election are not in all cases the only parties before the committee. When the petition contains matter of complaint against a returning officer, which may subject him to the censure of the house, he is allowed one counsel to attend on his behalf, 1 *Peck*, 77. 146. 504; and where the rights of electors, not being parties to the petition, are unexpectedly put in jeopardy in the course of the trial, they may be heard upon the subject in which their interests are concerned; *Shepherd on Elections* p. 95.

Not more than two counsel on each side are heard before the committee, but an additional one may be in attendance to act in the absence of either of the others. However numerous the petitions may be, if they are in substance the same, the petitioners are heard but by two counsel. But where separate petitions were presented by different electors against the right of election, determined by a former committee, as the object and interests of the different petitioners were the same, the committee resolved that counsel should be heard for one set of the petitioners only; *Liskeard Appeal*, 2 *Peck*, 317.

The order of hearing the parties is commonly as follows: 1st, the petitioning candidates, as their petitions are classed in the house; next the electors, if the right of election is disputed; and upon double returns, the candidate whose name is first in the return, or is immediately annexed to the writ. But this mode is occasionally departed from, where the necessity of justice requires it; see *Shepherd on Elections*, p. 96.

Of certain matters of evidence relating to election petitions. The poll is the best evidence of an election, and what persons were candidates and voters, *Limerick Corb. Dan.* 97; and should be produced, or the committee will refuse to proceed with a case, *Newcastle-under-Lyne*, 1 *Peck*, 492; but, like all other written instruments, it must be authenticated before it is received in evidence. But where the clerk of the peace produced twelve paper books, delivered to him by the under-sheriff as the poll-books, which were taken at different places, some by the sheriff's agents, and others by agents for the candidates; but he could not distinguish which of them made the sheriff's poll; and none of the books being either sworn to or attested by the sheriff, the committee did not think them sufficient to proceed upon; *Bucks*, 2 *Journ.* 80; 2 *Peck*, 271. a. So, where the poll was produced by the clerk of the peace, who stated he had received it from the assessor, to the returning officer, the committee refused to receive it in evidence, as not properly authenticated; *Dungarvon*, 1 *Roe*, 711. When a poll has been taken at an election for a city or borough, that also, when authenticated, is the best evidence of the election, the candidates and voters; and there are several decisions as to the proof required to authenticate as polls certain papers which purport to be polls. So they received the copy of a former poll, found in the Corporation chest, and indorsed by the town clerk; *Okehampton*, 1 *Fras.* 129. But copies of polls at two contested elections, found amongst the papers of the member who sat in consequence of those elections, were not received; *Harwich*, 1 *Peck*, 380. So, a paper, entitled "a true copy of the poll," &c., to which the hand-writing was not proved, found in a family repository of deeds and papers, was rejected; *Downton*, 1 *Lud.* 276.

Although the polls are the best evidence of the matters they contain, yet the cheque-books have been admitted to correct and amend the poll books, *Gloucester*, 162; *Bedford*,

number of the items for which this action is brought may be therefore, entirely laid out of consideration, as arising from acts which the plaintiff was bound to do by reason of his office, or as of such a nature that no inference to contribute to them can possibly be inferred. To proclaim the election is a duty which the law imposes upon the high-bailiff, and there is no less pretence for charging the candidates with it, as they had not been nominated. It does not seem necessary that he should have been attended on the occasion by six under-bailiffs the crier on horseback, &c.; but if it was, he must consider the consequent expense a burthen he took upon himself along with his office, which must be a lucrative one, from the terms on which it was purchased. 1 Lud. 356; and parol evidence was held admissible to correct both, where notice of the mistake was given to the sheriff at the election.

The minutes of a former committee were offered to prove, that there were such proceedings as the petition set forth; that the only evidence in those proceedings against A. B. was evidence of bribery and treating; that the committee declared A. B. not duly elected; and that such declaration therefore was in fact a determination that A. B. had been guilty of bribery and treating: the committee received the evidence, Norwich, 3 Led. 459. 474. 477; and their decision was according to law; for the proceedings were not tendered as evidence that A. B. had been guilty of bribery and treating, but merely that he had been declared so by a committee. But the minutes of a former committee being tendered to prove that the premises granted to certain disputed voters were the same, and the conveyances of the same nature, and made under the same circumstances, as in a former case, in which former case the committee had struck off the votes given in each of them, were rejected; Okehampton, 1 Peck. 375. Where a witness on a former petition has been shown to be dead, his evidence has been read from the minutes taken up on that petition; Steyning 2 Fras. 335.

Under the authority of the statute 10 G. 3. c. 16. s. 13. "to send for papers and records," the committee will neither compel, nor allow the production of certain documents to impeach a voter's title, without the consent of those interested in them; but evidence of the same facts which the document would have proved may be given by secondary means: 2 Peck, 133; 2 Lud. 568. But parol testimony, or writings with the consent of those interested in them, may supply the place of the proofs contained in the documents which are withholden; 2 Peck, 124. 129. 310.

When the committee report to the house their final determination on the merits of a petition, (except in the case of a petition against the right of election, or of appointing returning officers) they are to report whether it was frivolous or vexatious; or, if no party opposes the petition, whether the election, &c. complained of, was vexatious or corrupt; 28 G. 3. c. 50. s. 13; 55 G. 3. c. 71. Whenever the petition or the opposition, 28 G. 3. c. 50. s. 19. 20; 53 G. 3. c. 71. s. 3. shall be reported frivolous or vexatious, the petitioners, or persons opposing the petition, as may be, are liable to the costs incurred by the other side. The amount of these costs, &c., is to be ascertained by the taxation of two persons appointed by the speaker, out of certain persons specified in the statute s. 28 G. 3. c. 52. s. 22; 53 G. 3. c. 71. s. 10, 11; and the speaker will certify the amount of costs to be received according to their report, 28 G. 3. c. 52. s. 2; 35 G. 3. c. 71. s. 7; which certificate will have the effect of a warrant of attorney to confess a judgment; 53 G. 3. c. 71. s. 13; also, the recognizance entered into by the petitioners for the payment of the costs, &c. may be certified by the speaker's warrant into the Court of Exchequer, as if it were estreated. *ibid.* s. 12; where the costs have been recovered against either of the parties, he or they may recover a proportion against others who are liable; 28 G. 3. c. 52. s. 24. When the committee report to the house their final determination upon the merits of any petition, they are also to report their determination upon the right of election; (by 7 & 8 W. 3. c. 7 s. 1. returning officers are prohibited from making false returns, that is, such "as are contrary to the last determination of the House of Commons upon the right of election." By 2 G. 2. c. 24. s. 4. the last determination upon the legality of votes by the house was made final; but the statute did not extend to maiden boroughs, where no determination upon the right had been previously made; *vide* a note (8) in 4 Doug. 78. By an order of the house, Jan. 1735-6, the counsel at the bar, or before the Committee of Privileges, are restrained from offering evidence, touching the legality of votes, &c. contrary to the last determination in the house, and the order refers to the statute 2 G. 2. c. 24; 1 Doug. 99; 22 Journ. 498.) for the particular place to which the petition relates, or the right of choosing the returning officer, if the merits of the petition wholly or in part depend upon either of those rights; and for this purpose they are to require written statements of such rights from the respective parties. Their determination then being entered on the journals is conclusive as to those rights upon any future petition, unless appealed against within a year, by petition to the house; 28 G. 3. c. 52. s. 25. 26. 27. But this determination may be questioned within the year, not only by a petition of appeal, as mentioned in the statute, but on a petition complaining of an undue election or return, Malinsbury, 2 Peck, 400. See *Shepherd on Elections*, p. 109.

[674]
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So the law requires him to do whatever is necessary in making the returns; and, if the election cannot take place without the attendance of so many staff-men and poll-clerks, he alone must retain and pay them. The charge for the high-bailiff's table, however long established, cannot be sustained, and is without any colour of justice. For a share in the expense incurred in administering the oaths to the Roman Catholic electors, the defendant appears to be liable, if he shall be considered as having acceded to the character of a candidate. But the statute, while it casts this burden upon the candidate, regulates the amount of the compensation to be given to the commissioners, and enacts that the returning officer shall provide commissioners, at a sum not exceeding one guinea per day, for administering such oaths; therefore that item must be reduced to that amount. The defendant's liability as to the hustings will depend upon whether he has in any manner undertaken to defray a part of the expense of erecting them. In county elections the sheriff is required to erect hustings, to be paid by the candidates; but this act does not extend to cities or boroughs, as in this case. Still, however, the candidates may make themselves liable, by acts of this sort.

2. MORRIS V. BURDETT. M. T. 1813. K. B. 2 M. & S. 212.

The defendant had taken his seat as a member of the House of Commons for the city of Westminster; but it appeared that although nominated and elected, he had never been present at, or in any way interfered, either by himself or his agents, with the election, or had held himself out, or authorised any one else to hold him out as a candidate. The plaintiff sued, as bailiff of Westminster, to recover a moiety of the expenses of the hustings, which he and the other members it was alleged were liable to defray under the 51 G. 3. c. 126. *Sed per Cur.* The legislature has directed that convenient booths shall be erected by the bailiff for holding the election, and there can be no doubt that they assumed that, upon every occasion of an election, there would be found a candidate or candidates in the ordinary sense of that word—that is, persons offering themselves to the suffrages of the electors. It therefore appears to us, that this defendant was not a candidate within the true meaning of that word, having never acted as such, nor in any wise either directly or indirectly assented to becoming a candidate. If there had been any evidence of acts which might have amounted to an adoption of that character, it would have been different.

3. MORRIS V. HUNT. T. T. 1819. K. B. 1 Chit Rep. 453.

The court in this case held that the 53 G. 3. c. 152. was a public act, because it related to a branch of the legislature, and that therefore, in an action founded on that statute, at the suit of the high-bailiff of Westminster, to recover the expenses of erecting hustings, &c. on the election of members of parliament, it was not necessary to produce an examined copy of the act.*

4. WATKIN V. SANDYS. Lent Assizes, 1811. K. B. 2 Campb. N. P. C. 640. Assumpsit for work and labour, and materials found by plaintiff for the defendant. Plea, the general issue. The action was instituted to recover the expenses incurred at a county election of a member of parliament. It appeared that the defendants, who were both candidates, had jointly desired the sheriff to erect hustings, to provide poll-clerks, and to retain an assessor, promising to defray the expenses thus incurred. It was contended that a joint action could not be maintained. By the stat 18 G. 2. c. 18. s. 7. it is provided that the sheriff shall erect, at the expense of the candidates, such number of commodious booths for taking the poll as the candidates, or any of them, shall, three days at least before the commencement of the poll, desire, and shall affix the names of the candidates, and appoint poll-clerks, &c. But it could never be the intention of the legislature to make such candidates liable for all the expenses which should thus be incurred at the election.

* Nor is it necessary to produce the speakers writ to the sheriff, to show that the election was duly held; nor is it necessary for the high bailiff to prove that he has taken the oath against bribery, nor to produce the appointment, if it be proved that he acted as high bailiff; nor to produce the poll book, to prove the defendant to be a candidate if he were at the hustings as such; *Morris v. Hunt*; 1 Chit, Rep. 453.

[675]
By statute
51 Geo. 3.
c. 126. one
of two can-
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the city of
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ster is only
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bailiffs for
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the expen-
ses of the
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Morris v.
Lord Coch-
rane, 1 M.
& S. 283.
But a per-
son who
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terferes, by
himself or
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lection for
the city of
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ster, but af-
terwards
takes his
seat in the
house, is
not charge-
able under
that act;
And in such
an action it
is not neces-
sary to pro-
duce an ex-
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If the candi-
dates at a
county elec-
tion jointly
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Per Lawrence, J. The plaintiff does not proceed upon the statute. If the sheriff had merely been desired to erect booths in pursuance of the statute, then we should have had to consider what remedy the statute gives him. But there is an express undertaking, on the part of both, to pay for the hustings, the assessor and the poll-clerk; on which the two are jointly liable.*

5. RIBBANS V. CRICKETT. E. T. 1798. C. P. 1 B. & P. 264. S. P. LORHOUSE V. WHARTON. Durham Assizes, 1808. 1 Camp. 550. n.

This was an action by an innkeeper to recover for provisions furnished to a candidate at an election for a member to serve in parliament. The provisions had been furnished at the defendant's request, but subsequent to the writ. The contract, it was urged, could not be carried into effect, being contrary to the provisions of the 7 & 8 W. 3. c. 4. which declares, that no person, &c. after the writ, &c. shall, before his election, directly or indirectly, give presents, or allow to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter make any promise, agreement, obligation, or engagement to give or allow any money, meat, &c. to or for any such person or persons in particular; or any such county, city, &c.; or to or for the use, &c. of any such person, place, &c. in order to be elected, or for being elected to serve in parliament for such county, city, &c. The court said, that the contract was bottomed in *malum prohibitum*, and could not be supported.

6. STRACHEY V. TURLEY. T. T. 1806. K. B. 7 East, 507; S. C. 3 Smith's Rep. 560. | 677 |

Two several petitions, signed by different persons, were presented to the House of Commons, against the return of members to serve in parliament for East Grinstead, which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious. The Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners, and having afterwards, by an amended certificate, appointed how much of the first-mentioned sum taxed was incurred by the sitting members in opposing the two petitions jointly, and how much was so incurred by them in opposing such separately, the plaintiffs, by the advice of the Court, submitted to enter into the nonsuits, as well in two several actions promoted against the respective petitioners for the separate costs certified against each, as also in a joint action against all to recover the taxation certified against them all jointly.

7. STRACHEY V. TURLEY. E. T. 1809. K. B. 11 East, 194; S. C. 3 Smith's Rep. 160.

This was a case in which a point was raised connected with the facts in the preceding case; viz. whether any other but the Speaker, at the time of making the report of the committee, could grant a new certificate: in other words, whether the Speaker of a new parliament could?

Per Cur. The clause in the 28 Geo. 3. c. 52. says, that on application to the Speaker of the House of Commons by any such petitioner, &c. for ascertaining such costs, he shall direct the same to be taxed by two persons out of a certain description of officers. Now suppose the Speaker had died after the report of the committee and before such a direction to those officers could have been made; or, suppose after such direction, the particular officer charged with the taxation had died, can it be contended that the succeeding Speaker in the one case could not have directed the costs to be taxed; or, in the other, that the same speaker would have had no power to direct the taxation to be made by the other officers in the place of those who had died. The words of the writ are, *the Speaker*; that is, who was or shall be Speaker when the certificate is to be granted.

* But the sheriff is not entitled to charge the candidates with any part of the expense necessarily incurred by him in executing the writ, and making the return, and for those things expressly ordered by the candidates; they are only bound to make him a fair remuneration, although he himself have paid more in submitting to exorbitant charges, usually made on such occasions: 2 Campb. 640.

In an action for the costs of a frivolous petition against the election of a member, defendant's

[678]

subscription of the petition need not be proved, and demand of the costs is unnecessary.

Any one appearing before the committee is a party entitled to costs, upon a vexatious petition, under the 28 G. 3.

8. CLEVELAND v. WILSON. H. T. 1792. K. B. Peake N. P. C. 143.

Action of debt for the costs of a frivolous petition against the election of a member of parliament. Proof was adduced of the Speaker's certificate, and a copy of the entry on the journals of the House of Commons of the resolution of the select committee. It was objected, that the defendant had signed the petition, and that the money had been personally demanded of him. Lord Kenyon thought sufficient evidence had been given.

9. TRUMAN v. LAMBERT. T. T. 1815. K. B. 4 M. & S. 234.

A petition had been presented to the House of Commons against the return of a member, and also charging the returning officer with corruption and bribery. The returning officer attended before the select committee, and brought witnesses to defend himself against those charges. The committee reported that the charges appeared to them frivolous and vexatious, which resolution was entered in the journals. The returning officer obtained the speaker's order and certificate, pursuant to the statute 28 Geo. 3. c. 52. ascertaining the amount of his costs and expences. This was an action of debt against the defendant, by virtue of the above statute. It was urged that the plaintiff was not a party so as to be entitled to costs under the act, as that statute was confined to such cases as were within the former acts referred to in the 28 Geo. 3. One of these was the 10 Geo. 3. c. 16. which accounted those parties who were the petitioners and sitting members. This was extended by the 11 Geo. 3. c. 42. to the several parties who, on distinct grounds and interests, should present separate petitions, and by sec. 6. each of them shall strike the committee. Then the 25 Geo. 3. c. 84. s. 10. made the returning officers, in certain cases, a party. But the present case, it was urged, fell within neither of these acts, and consequently not within the 28 Geo. 3.

Sed per Cur. Very likely, for the purpose of striking the list of the committee, he may not be a distinct party. But if a party, whose office is to make the return, be charged with corrupt conduct in that office, is it not consonant to reason to say that he is not a party, if he appear in order to repel the charge?

2ndly. For Scotland.*

3rdly. For Ireland.†

[679]

* On this head, the following acts may be consulted. The 5th Ann. c. 8. s. 12. entitled: "An act settling the manner of electing the sixteen peers and forty-five members to represent Scotland in the parliament of Great Britain." The 6th Ann. c. 6. entitled: "An act for rendering the union of the two kingdoms more complete." The 6th Ann. c. 23. entitled: "An act to make further provision for electing and summoning sixteen peers of Scotland to sit in the House of Peers in the parliament of Great Britain, and for trying peers for offences committed in Scotland, and for the further regulation of voters in election of members to serve in parliament." The 1st Geo. 1. c. 13. The 7th Geo. 2. c. 16. entitled, "An act for the better regulating the election of members to serve in the House of Commons for that part of Great Britain called Scotland, and for incapacitating the judges of the Court of Session, Court of Justiciary, and Barons of the Court of Exchequer in Scotland to be elected, or to sit and vote as members of the House of Commons." The 16 Geo. 2. c. 11. regulating inter alia, the conduct of returning officers. The 14 Geo. 3. c. 81. altering and amending the 16 Geo. 2. The 35 Geo. 3. c. 65. to prevent unnecessary delay in the execution of writs. The 37 Geo. 3. c. 138. entitled, "An act to amend an act passed in the 22d year of the reign of Geo. 3. entitled, An act for better securing the freedom of election of members to serve in parliament, by disabling certain officers employed in the collection or management of his Majesty's revenues from giving their votes at such elections, by extending the provisions thereof, to persons voting in any meeting of freeholders for proxies and clerk, or on any question relative to the adjustment of the roll of freeholders in that part of Great Britain called Scotland, and for empowering freeholders to administer the oath of trust and possession to persons offering to vote for parson and clerk."

† To obtain a knowledge of the law of elections connected with Ireland, reference must be made to the 33 Geo. 3. c. 21; 35 Geo. 3. c. 22; 37 Geo. 3. c. 47; 39 & 40 Geo. 3. c. 67; 40 Geo. 3. c. 80; 41 Geo. 3. c. 52; 41 Geo. 3. c. 101; 42 Geo. 3. c. 106; 43 Geo. 3. c. 25; 45 Geo. 3. c. 59; 47 Geo. 3. c. 14; 51 Geo. 3. c. 77; 60 Geo. 3. c. 7. regulating the trial of controverted elections; 1 Geo. 4. c. 11. as to the regulating of polls, &c; 1 & 2 Geo. 4. c. 58. regulating expenses of elections of members; 4 Geo. 4. c. 55. entitled, "An act to consolidate and amend the several acts now in force, so far as the same relate to the election and return of members to serve in parliament for counties of cities and counties of towns in Ireland."

II. CONNECTED WITH PROPERTY. *Vide* Analysis.**Elegit.** See *tit. Execution; Judgment; Poundage; Scire facias*.

I. RELATIVE TO THE NATURE OF THE WRIT, p. 679.

II. IN WHAT CASES, HOW SUED OUT, AND HOW FAR EFFECTUAL, p. 680.

III. AGAINST WHOM IT LIES, p. 680.

IV. RELATIVE TO THE EXECUTION OF THE WRIT.

(A) PERIOD OF EXECUTION, p. 681.

(B) NOTICE OF EXECUTION, p. 681

(C) MODE OF EXECUTION, AND SHERIFF'S DUTY THEREON, p. 681.

V. RELATIVE TO WHAT LANDS MAY BE EXTENDED UNDER IT, p. 684.

VI. ——— THE RELATION OF THE WRIT, p. 685.

VII. ——— THE RETURN, p. 686.

VIII. ——— WHAT WRITS MAY ISSUE AFTER AN *ELEGIT*, p. 686.IX. ——— AN *ELEGIT* BEING GOOD IN PART, AND BAD IN PART, p. 687.X. ——— THE ESTATE CONFERRED UPON TENANT BY *ELEGIT*, p. 687.

XI. ——— THE DEFENDANT'S RECEIVING BACK HIS LAND, p. 687.

XII. ——— POUNDAGE, *Vide post*, *tit. Poundage*.

I. RELATIVE TO THE NATURE OF THE WRIT.*

II. IN WHAT CASES, HOW SUED OUT, AND HOW FAR EFFECTUAL. [680]

RUTLAND v. NEWNHAM. E. T. 1817. K. B. 2 Chit. Rep. 384; *Semb.* S. C. MS. 2 Tidd. Pr. 155. 8 edit. over-ruling SEYMOUR v. GRENVILLE. Carth. 283; S. C. Comb. 232.

After the lapse of a year and a day from the time of obtaining judgment, the plaintiff, without issuing a *scire facias*, awarded an *elegit* on the roll, continuing it down by *vicecomes non misit breve*; and then issued and executed an *elegit*. A rule had been obtained to set aside the *elegit* and the proceedings thereon, on the ground that no *scire facias* had been sued out. The case of Seymour v. Grenville was relied on.

Sed per Cur. The rule must be made absolute. There is nothing to distinguish this from the general cases.

* Lands were not originally liable to execution at the suit of a subject (except in judgment against the heir, in an action on the bond of his ancestor; 3 Rep. 12,) and the statute of Westminster, the second ch. 18. which first made this chargeable, gives the plaintiff his election to go against the goods and profits, or against the goods, and a moiety of the lands of the defendant; which election has given name to the writ of "*elegit*;" see the form of the writ in general, *Thes. Brev.* 93; *Lil. Ent.* 57: 10 *Went.* 246; *Archb. Forms*, 154. et *post*, Appendix, and to a county palatine; see *Archb. Forms*, 179.

The plaintiff may award upon the roll writs of *elegit* for the whole debt into as many different counties as he pleases, without being under the necessity of suing out testatum writs of *elegit*, and may execute all and any of them at his pleasure; *Archb. Pr. K. B.* vol. i. p. 298.

† If A. have two judgments against C., and in the same term take two *elegits*, on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained to a moiety of the moiety; for, in judgment of law, the whole term is but as one day; *Hardw.* 23. But if A. & B. recover several judgments against C., and A. sue out an *elegit*, and have a moiety of C.'s lands delivered to him, and then B. sue out an *elegit*, the sheriff it seems, can only extend a moiety of the remaining lands; *Cro. Eliz.* 413; 2 *Bac. Abr.* 350; *Gilb. Exec.* 55. It is presumed, however, that the *elegits* in these last cases were sued out in different terms.

It has been seen in a previous note, that the plaintiff may award upon the roll writs of *elegit* for the whole debt into as many different counties as he pleases. It is also said that the plaintiff may divide his execution into several sums, as when he recovers 30l. he may have an *elegit* into one county for 10l. another *elegit* into another county for 8l., and another for

A writ of *elegit* must be issued within a year, unless there is a *scire facias* or some previous writ sued out within the year to warrant it.†

III. AGAINST WHOM IT LIES.*

IV. RELATIVE TO THE EXECUTION OF THE WRIT.

(A) PERIOD OF EXECUTION.†

(B) NOTICE OF EXECUTION.‡

(C) MODE OF EXECUTION, AND SHERIFF'S DUTY THEREON.

[681]

Upon receipt of the *elegit*, the sheriff in pannels a jury. § On inquisition had, the sheriff delivers all the defendant's goods and chattels, and a moiety of the lands to the plaintiff; ** which moiety must be set out by metes and bounds. ††

1. PULLEN v. PURBECKE. T. T. 1700. 3 K. B. 2 Salk. 563; S. C. 1 Lord Raym. 346. 718; S. C. 1 Vent. 259; S. C. Carth. 453. S. P. BERRY v. WHEELER. M. T. 1662. K. B. 1 Sid. 91. S. P. EARL OF STAMFORD v. HOBART. H. T. 1663; *ibid.* 239; *semb.* S. C. 1 Lev. 160; S. C. 1 Keb. 858.

To *scire facias* upon a judgment, defendant pleaded in bar, that the plaintiff had before sued an *elegit* on the same judgment, directed to the sheriff, who thereupon returned an inquisition taken, and a delivery of such certain parcels the residue into a third county; but an award of an *elegit* into several counties for the whole debt seems to be the most proper way, because the judgment is entire. If a writ of *elegit* be sued out, and the plaintiff extend the land upon it, and return and file the writ, it was long doubted whether he should afterwards have an *elegit* into another county, as for other lands in the same county; but it seems to be now settled that on a suggestion that the defendant has more lands either in the same or another county, the plaintiff may have a new *elegit* for a moiety of the land in whatever county it lies; 2 Wms. Saund. 68. a. n.

When the writ of *elegit* is sued out, engross it on a plain piece of parchment, get it signed; pay 1s. 8d., and sealed, pay 7d. At the time the writ is sealed, you must produce to the sealer of the writs the postea, judgment paper, or inquisition; R. H. 2 & 3 Geo. 4. Indorse it to levy the debt, thus: "Levy the sum of —l., besides sheriff's poundage, officer's fees, and other incidental expenses. A. B., James-street, plaintiff's attorney." Indorse on it also the defendant's addition and place of abode, or such other description of him as you are enabled to give; R. H. 2 & 3 Geo. 4., and deliver it to the sheriff or officer to execute; see 1 Arch. Pr. vol. i. p. 299. 2d edition.

* The writ of *elegit* lies against the defendant in his life-time, or his heir or terre-tenant, after his death; 2 Tidd. Prac. 1073. And it may be had against peers of the realm, as well as others, and also against executors and administrators upon a devastavit returned; 1 Crompt. 346. But it lies not against an heir till his full age, and therefore on a *scire facias* brought against him, the plea shall demur, because he may have a good plea to bar the execution, which might be mispleaded; Gilb. Ex. 58.

† If a writ of *elegit* be sued out in the life-time of the defendant, it may be executed after his death. For there is a distinction between writs original and judicial, in respect of the abatement of the suit by the death of the defendant. The former generally abate, if the defendant die before judgment, but the latter are not affected by it; O. Bridgm. 467. And though the statute giving the *elegit* has not made any express provision concerning the abatement of it by the death of the defendant, it ought to be construed in the same manner as other processes of execution, which does not abate by death, when the defendant has no day in court; Id. 464. 478; 2 Tidd's Pr. 1074, 8th edition.

If judgment be obtained against two, and one of them die before execution, the judgment survives as to the personalty, but not as to the realty; that is, the judgment binds the goods of the survivor only, but it binds the lands both of the survivor and of the deceased. Therefore, if you intend to proceed in the personalty, you must have your *fieri facias* executed upon the goods of the survivor alone; but if in the realty, then after a *scire facias* against the survivor, and the heir and terretenants of the deceased, the plaintiff may sue out an *elegit* against them (for he cannot proceed in the realty against the survivor alone) and thereupon extend the lands of the deceased as well as those of the survivor; 2 Saund. 50. n. (n. 4.) But it is said that, if all the defendants die, and one leave lands and the others not, the plaintiff may sue out an *elegit* against the heir and terretenants of him who left the lands, alone; 1 Arch. Pr. K. B. 301. 2d edition.

‡ No notice is given of executing an *elegit*; 1 Crompt. 363.

§ They must inquire of all the goods and chattels of the debtor, and appraise the same; and also inquire as to his lands and tenements; 2 Bac. Ab. Execution, C. 2.

|| Except beasts of the plough; 2 Bac. Ab. Execution, C. 2. Co. Litt. 389. b.

** And must return the writ, in order that the inquisition may be recorded in the court out of which the *elegit* issued; Dy. 100.; 5 Co. 74. a. b; as to which vide post, p. 686.

The inquisition must find the lands with certainty, the place and county where they lie, and where the inquisition is taken, Dy. 208; the estate the defendant has in them, see Moor. 8; whether seised in severalty, or as joint tenant, or tenant in common, Brownl. 38; and their value, Cro. Car. 319; 1 Arch. Pr. K. B. 299.

†† If the goods be sufficient to satisfy the judgment, the sheriff must not extend the lands, 2 Inst. 395; but merely to deliver the goods to the plaintiff at the value set upon them by the jury, Cro. Car. 319.

thereof. The parcels amounted to more than a moiety. Upon these facts [682] appearing to the Court, they held that the execution was merely void; for the sheriff had only a circumscribed authority, and had exceeded it. If he delivers more or less than a moiety;*

2. FENNY, D. MASTERS, v. DURRANT. M. T. 1817. K. B. 1 B. & A. 40.

The sheriff's return to an *elegit* stated, that he had delivered an equal moiety of a house. An action of ejectment had been brought upon such *elegit*.—It had been objected that the return was void, the sheriff not having set out a moiety of the house by metes and bounds, as he ought to have done. The jury were directed to find a verdict for the plaintiff with liberty to the defendant to move. This was now done. In support of the motion, reliance was placed upon the case of Pullen v. Birkbeck, Carth. 453. Or do not set it out by metes and bounds; the execution will be void.

Per Cur. The language of Lord Holt, in the case cited from Carthew, is decisive, that if upon an *elegit*, the sheriff deliver a moiety of a house without metes and bounds, such return is invalid.

3. DEN, D. TAYLOR, v. THE EARL OF ABINGDON. M. T. 1780. K. B. 2 Doug. 473. over-ruling, as to this point, EARL OF STAMFORD v. HOBART, ante, p. 681.

An action of ejectment was in this case brought to obtain possession of lands extended under an *elegit*. At the trial it appeared, from the production of the inquisition, that it mentioned by name all the different farms and tenements of the defendant's estate in the county, with their value, the number of acres in each, be the same more or less, the tenants' names, yearly value besides prizes, and the clear yearly amount of the whole; and then, repeating the names of a certain number of them, their number of acres, more or less, and yearly amount, it found that those particular farms and tenements were a true and equal moiety of all the said lands and premises of the defendant in the county; "which moiety of the said lands and premises, I, the said sheriff, on the day of taking this inquisition, have caused to be delivered to the lessor of the plaintiff, by the price and extent aforesaid." Upon this it was objected, on the part of the defendant, that the *elegit* had not been duly executed, and that the inquisition was void on the face of it; for that a moiety of each farm ought to have been extended and delivered to the lessor of the plaintiff, and not a certain number of distinct farms, amounting in value to a moiety of the whole. A verdict was recorded for the plaintiff, subject to the opinion of the Court, who now ordered the *posse* to be delivered to the plaintiff. He is not, however, bound to set out a moiety of each particular tenement or farm. [683]

4. MORRIS v. JONES. M. T. 1823. K. B. 3 D. & R. 603; S. C. 2 B. & C. 632.

It appeared that under one *elegit* a moiety of defendant's lands has been taken to satisfy a judgment. Under a second *elegit*, the whole of the remainder of his lands had been taken. A motion was, under these circumstances, now made for a rule *nisi*, to set aside the second writ of *elegit* and the inquisition taken thereon, inasmuch as a moiety only of that moiety which was not extended by the first, could be taken. It was not attempted by the counsel to contend that the sheriff had acted properly in seizing the whole residue of the lands; but it was urged that such fact formed no ground for the present application, because the return to the second *elegit* was altogether void, and might upon an

* A question having arisen in the Court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed interest, beyond the penalty of a judgment, Lord Hardwicke was of opinion, that at law, upon a judgment entered up, the penalty is the debitum recuperatum, and the stated damages between the parties; but, if the creditors do not take out an execution against the person of the debtor or his personal estate, but extend the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds quousque debitum satisfactum fuerit, and at law the debtor cannot, upon a writ *ad compunctandum*, insist upon the creditor's doing more than account for the extended value; but, if the debtor come into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and, as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal; and he said he remembered very well, upon Serjeant Whitaker's insisting, before Lord Chancellor Cowper, that this would be repealing the statute of Westminster, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received, 3 Atk. 517, 518; and see Amb. 520, 521; 1 East, 408. 436. So, if two persons have judgment against a defendant, and one of them have a moiety of defendant's lands delivered to him upon an *elegit*, and more than a moiety of the residue be extended under the second

writ, the inquisition will be void.

The sheriff does not, however, deliver actual possession. He only gives legal possession of the lands; and if the plaintiff do not enter, which, it seems, he may do by an *elegit*;

He must, in order to [684] obtain actual possession, proceed by ejectment;* In which an examined copy of the judgment roll containing the award

be treated as such by the defendant, without the interference of the Court.—The Court refused the application.

5. *ROBINSON V. PITCHER*. E. T. 1815. C. P. 6 Taunt. 202. S. C. 1 Marsh, 542.

In this case, Gibbs, C. J., made use of the following remarks:—"I am aware that it has in several places been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case in which a party may maintain ejectment in which he cannot enter. The ejectment supposes that he has entered; at least, that he has leased to another, and that that other has entered; and that the lessor may do it by another, and cannot enter himself, is not very intelligible. I would not, however, consider the present case as now deciding those points, which I only throw out in answer to the argument which has been used. This is a case to which the doctrine does not apply; for no ejectment could be in this case maintained, there being a tenant who was entitled to retain the possession.

6. *TAYLOR V. COLE*. E. T. 1789. K. B. 3 T. R. 295.

In this case the Court, in making remarks as to the effect produced by a levy under a *scire facias*, said, that under an *elegit*, the sheriff certainly could not deliver the land extended.

7. *ROBINSON V. BUCKHURST*. E. T. 1814. K. B. 2 M. & S. 565.

Action for use and occupation. The claim was under an *elegit*. Proof was adduced at the trial of an examined copy of the record, containing the judgment, the award of *elegit*, and return of the inquisition. It was urged that a copy of the *elegit* and of the inquisition should have been proved. A verdict was given for the plaintiff. A rule nisi had been obtained to set it aside.

Per Cur. The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth, and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true. The rule must be therefore discharged.

of the *elegit* and return of the inquisition, is evidence of the lessor of the plaintiff's title.

V. RELATIVE TO WHAT LANDS MAY BE EXTENDED UNDER IT.†

1. *HUNT V. COLES*. T. T. 1714. C. P. 1 Com. 226.

Estates held in trust for a defendant may be extended.

Ejectment. Plea—Not guilty. On the trial it appeared that the defendant had been seised of the lands at the time of the judgment, but had subsequently conveyed them away, by the direction of *cestui que trust*. The Court held, that the lands could not in *this case* be extended; the 29 Car. 2. c. 3, using the words, when referring to the trustees' seisin in such cases, "at the time of the said execution sued."

* So, if he be evicted before the debt be wholly levied, he shall recover it again by writ of novel disseisin, and after that by writ of re-disseisin, if need be, stat. Westminster, 2 (13 Ed. 1) c. 18; or by ejectment; or he may have a *scire facias*, and re-extent by stat. 32 H. 8. c. 5; see Co. Litt. 289. b. 290. a; 4 Co. 66. a; Cro. Jac. 328; and see 8 G. 1. c. 25. s. 4.

† The sheriff may extend under an *elegit* lands in ancient demesne, Hob. 47; Moor. 211; Brownl. 234; 4 Inst. 370; 2 Inst. 397; or rent-charges, Moor. 32. But copyholds cannot be extended, 3 D. & R. 603; 3 Co. 9; Co. Copy. 149; 1 Rol. Abr. 888; nor even a term for years of copyhold lands, made by license of the lord, 1 Rol. Abr. 888; nor a mere rent-rack, Cro. Eliz. 65. 66; 3 Co. 9; nor was, it seems, an advowson in gross, Gilb. Execution, 39; see *vide* 3 P. Wms. 401; nor the glebe of a parsonage or vicarage, nor a churchyard, Gilb. Execution, 40; Jenk. 207; although it is said that the lands of a bishop may be extended, Dalt. 136. The sheriff, however, cannot extend under an *elegit* any tenement which cannot be granted over, such as the office of filacer, Dy. 7; or the like.

‡ By the 10th section it is enacted, that "it shall be lawful for every sheriff or other officer to whom any writ or precept is directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons are in any manner seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued, had been seised of such lands, &c., of such estate as they are seised of in trust for him at the time of the said

2. *DOE, D. HULL, v. GREENHILL.* T. T. 1821. K. B. 4 B. & A. 684. [685]

The question in this case was, whether a trust, created by a defendant in favour of himself and another, was a trust within the meaning of the 10th section of the 29 Car. 2. c. 3. rendering lands held in trust, subject to a writ of *elegit*. Abbott, C. J., said: we are all of opinion, that this case does not present a trust within the intent and meaning of the statute. The words of the statute are "seised or possessed, in trust for him against whom execution is sued, like as the sheriff might and ought to do, if that person were seised." not.* But a trust created by a defendant in favour of himself and another person can son can

This statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus trusted must be a clear and simple trust, for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor.

VI. RELATIVE TO THE RELATION OF THE WRIT.†

VII. RELATIVE TO THE RETURN.

STONEHOUSE v. EWEN. T. T. 1732. K. B. 2 Stra. 874.

Per Cur. If it be returned to an *elegit* that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any.

execution sued, which lands, &c., by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed, in trust for the person against whom such execution shall be sued. And if any cestui que trust shall die, leaving a trust in fee-simple to descend to his heir, then, and in every such instance, such trust shall be deemed and taken, and is thereby declared, to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestor, for and by reason of such estate, as fully and amply as he might or ought to have been if the estate in law had descended to him in possession, in like manner as the trust descended."

Formerly at common law, if a man was seised of the legal estate in lands to the use of or in trust for another, against whom a judgment had been obtained, or who had entered into a statute or recognizance, those lands were not liable to execution upon the judgment statute or recognizance of cestui que trust, Co. Litt. 374. b; 2 Williams' Saunders, 11. (17).

* So an equity of redemption cannot be taken in execution on the above statute, though it is deemed assets, 3 Atk. 200. 739; 1 Ves. jun. 431; see 3 Bro. Ch. C. 478; 8 East, 467; 2 N. R. 461; and see 2 Freem. 115; 2 Atk. 290; and therefore, when the estate is mortgaged, the plaintiff's remedy is by filing a bill in equity, to redeem, which he is entitled to do, on payment of principle, interest, and costs; Pow. Mortg. 99. 1st. edit.; and see 1 Madd. Chan. 522. 523.

† The judgment having relation in point of form, (unless any thing appear on the record showing that it cannot have that relation, 3 Burr. 1596.) to the first day of the term whereof it is entered, 3 Salk. 212; 1 Wils. 39; 7 T. R. 21; or of the preceding term when entered in vacation, and execution relating to the judgment, the execution affects whatever freehold lands the defendant or any person in trust for him, 29 Car. 2. c. 3. s. 10; were seised of, at or after the time to which the judgment relates; and where there is a term attendant on the inheritance, the judgment being a lien on the inheritance, the execution consequently affects the term in like manner, 2 Vern. 525; but, in general, leasehold property is only bound as against the defendant, by the suing out, Godb. 161; 8 Rep. 171; and as against purchasers, by the delivery of, the writ of execution to the sheriff, 3 Atk. 739; 1 Ves. 195.

The writ affects freehold lands as against purchasers by relation only to the time of signing judgment, 29 Car. 2. c. 3. s. 14. 15; which judgment must be docketed, 2 & 5 W. and M. c. 20. s. 2. and 3, made perpetual by 7 and 8 H. 3. c. 36. s. 3.

In actions of debt against the heir on the bond of his ancestor, the execution relates as between the parties to the action; (for, if the heir aliens before judgment, the land is protected in the hands of a bona fide purchaser, by stat. 3 & 4 W. 3;) to the time of original purchase, Co. Litt. 102. b; or bill filed, Carth. 245; et vide ante, vol. 4. p. 650.

In Middlesex and Yorkshire, it is required that judgments and recognizances should be registered, vide ante, vol. vii. p. 682. n.; and in those counties lands are not charged by a judgment or recognizance, as against purchasers until the time of such registry. Execution therefore, in those counties, only relates to and affects lands from the time of registering the judgment or recognizance.

‡ But when chattles have been appraised and delivered to the plaintiff, the sheriff should

An *elegit* must always be returned, 5 [686] Co. 90. a; 4 Co. 74; Cro. Jac. 569; Cro. Eliz. 584. And if lands have been extended under it, the inquisition must also be entered and filed.‡

If the sheriff return that he has levied upon the goods for part, and return *nil* as to the lands, the plaintiff may have a *capias ad satisfaciendum* or *fiat facias* for the residue. Or another *elegit*.†

VIII. RELATIVE TO WHAT WRITS MAY ISSUE AFTER AN *ELEGIT*.*

1. *BACON v. PECK*. M. T. 1721. K. B. 1 Str. 226. S. P. LANCASTER v. FIELDER. M. T. 1728. K. B. 2 Ld. Raym. 1451.

The plaintiff took out an *elegit*, and by virtue thereof levied part of the debt upon the goods; and, after a *nil* returned as to the lands, sued out a *ca. sa.* and arrested the defendant. A motion was made to quash the writ, because the plaintiff by taking out an *elegit*, had waived any other execution.

Sed per Cur. The election is not complete,† unless the plaintiff has some benefit from the land; for the taking out the writ is not an actual election, but only in order to an election. We must refuse the motion.

2. *GLASCOCK v. MORGAN*. H. T. 1662. K. B. 1 Lev. 92; S. C. 1 Sid. 184.

In this case the Court held, that if the sheriff return to a writ of *elegit*, that he has levied upon the goods for part, and returns *nil* as to the lands, the party is entitled to sue out another *elegit*, or he may have an action of debt on the judgment.

[687] IX. RELATIVE TO AN *ELEGIT* BEING GOOD IN PART AND BAD IN PART.‡

X. RELATIVE TO THE ESTATE CONFERRED UPON TENANT BY *ELEGIT*.||

XI. RELATIVE TO THE DEFENDANT'S RECEIVING BACK HIS LAND.**

return to the writ, that he delivered the goods at a reasonable price fixed by the jury: Doug. 100. a. pl. 71. If any objection is intended to be made to the inquisition, it must be made before the inquisition is filed; 2 Inst. 396; 2 Ch. Ca. 183. sed vide 1 Vent. 259.

* If no land be extended on an *elegit*, the sheriff may, of course, bring an *elegit* into another county: or, even if lands be extended upon the first *elegit*, the plaintiff, on a suggestion that the defendant has more lands in another county may have this *elegit* directed to the sheriff of such county: Hob. 57; Ro. Abr. 404; Mod. 341; Sir. 454.

† And even where an election has been made, other writs of execution may be had recourse to, if the party be evicted; Bro. Ab. *Elegit*, 15; 1 Rol. Abr. 896.

‡ So, if the *elegit* be ineffective, as if the sheriff returns that he has taken an inquisition of the lands, but could not deliver a moiety thereof, because they were already extended, the plaintiff may have a *capias ad satisfaciendum*, or *fiat facias*; 1 Rol. Abr. 905. So, if the inquisition be avoided for matter extrinsic; 1 Arch. Pr. K. B. vol. p. 302. 2d edition. So, if it be void for matter appearing upon the face of it, then as the plaintiff can never obtain actual possession of the land under it, he should get the court to vacate the writ, and award another, which may be done either upon a suggestion of the matter, or upon *scire facias*; see Townsend Judgm. 129; 2 Saund. 63. c.

So, although an *elegit* be awarded on the roll, yet if no writ in fact issue, 2 Saund. 68. c., or if it have issued, but nothing be done or returned on it, Moore, 545. the plaintiff is not thereby precluded from having execution by *capias ad satisfaciendum*, or *fiat facias*, at his option.

In most cases, it is more advisable to sue out a *fiat facias* against the debtor's goods in the first instance, and if they are not sufficient to satisfy the debt, then to sue out an *elegit* against his land; 2 Saund. 69. n.; 1 Arch. Pr. K. B. vol. i. p. 362. 2d edition.

§ If the sheriff extend lands, &c. not extendible by law, and also extend lands which are extendible, the inquisition may be good as to the latter, though bad as to the former; 3 D. and R. 603.

|| Although the statute says that the plaintiff shall hold the lands "as his freehold," yet tenant by *elegit* has not a freehold, but a chattel interest only, which goes to his executors; Co. Litt. 42, 43; 2 Inst. 396; 2 Bl. Com. 161.

** As soon as the plaintiff shall have fully satisfied his judgment out of the extended value of the land, the defendant may recover back his lands from him either by an action of ejectment; or by a *scire facias ad rehabendam terram*; or, before he has so satisfied his judgment, the defendant, upon tendering to him in court whatever may be deficient of the amount of the judgment, may recover his lands by a *scire facias ad rehabendam terram*; 1 Arch. Pr. K. B. vol. i. p. 302. 2d. edit. Formerly the most usual and generally the most advisable mode was by bill in equity; but the Court of King's Bench in one case referred it to the Master, to ascertain the amount of the rents and profits received, and if the debt was satisfied, ordered possession to be delivered to the defendant; 5 D. & R. 612; S. C. 3 B. & C. 733.

Hyp.* See tit. *Ecclesiastical Persons*.

Embezzlement.

I. RELATIVE TO MONEYS OR EFFECTS.

(A) BY PRIVATE INDIVIDUALS.

(a) Clerks or other servants, p. 688. (b) Bankers, merchants, brokers, attorneys, or other agents, p. 689.

(B) BY PUBLIC OFFICERS.

(a) Clerks in the Bank of England, p. 690. (b) Collectors of rates or taxes, p. 692. (c) Surveyors of highways, p. 692.

[688]

II. RELATIVE TO OTHER PERSONAL PROPERTY.

(A) PROPERTY IN A WORKHOUSE, p. 692.

(B) ——— THE GREENWICH HOSPITAL, p. 692.

(C) MANUFACTURES, p. 692.

(D) LETTERS, &c., BY POST-OFFICE OFFICERS, &c., p. 692.

(E) MILITARY AND NAVAL STORES, p. 693.

III. RELATIVE TO THE INDICTMENT, p. 693.

IV. RELATIVE TO THE EVIDENCE, p. 695.

V. RELATIVE TO THE PUNISHMENT, p. 695.

I. RELATIVE TO MONEYS OR EFFECTS.

(A. BY PRIVATE INDIVIDUALS.

(a) *Clerks or other servants.*

1. *REX v. JOHNSON.* II. T. 1815 K. B. 3 M. & S. 548.

Per Lord Ellenborough, C. J. To bring the offender within the 39 Geo. 3. c. 85. he must be a servant, or clerk, &c.; he must receive or take into his possession, the moneys or other effects; and that must be for or on account of his master; and lastly, he must fraudulently embezzle the same.

2. *REX v. WHITTINGHAM.* Feb. Sessions, 1806. Old Bailey, 2 Leach, C. L. 1912. S. P. *REX v. HEADGE.* Sept. Sessions, 1809. Old Bailey, 2 Leach, C. L. 1033.

On an indictment on 39 Geo. 3. for embezzlement, it appeared the prosecutor having reason to doubt the prisoner's honesty, he promised A. B. to mark certain moneys, and send C. D. to his shop to make a purchase. The prisoner gave the necessary change out of his own pocket, and the marked moneys were afterwards found secreted in the prisoner's trunk. Upon this evidence it was contended, that the case was not within the statute, as that act applied only to cases where the moneys had been paid to the servant by other persons than the master, and not as here, where the moneys had come immediately from his hand. But the Court held, that if a servant receive the money either from the master or from a third person on the master's account, it is sufficient.

3. *PECK'S CASE.* Summer Assizes, 1817. Stafford. cited, 2 Rugs. C. & M. 1233.

The indictment charged the prisoner with having received and taken into his possession 1s. on account of his master, and embezzling the same. It appeared that where

If the lands be removed back by ejectment, or *scire facias*, the plaintiff will not be enabled by the extended value of the land, which is usually very much below the real value. But if the lands be recovered back by a suit in equity, the plaintiff will be allowed interest on his judgment; but, on the other hand, he will be obliged to account, not for the extended value merely, but for the actual profits of the lands while in his possession; 3 Atk. 517; Amb. 520; 2 Ves. 589; 1 Arch. Pr. K. B. vol. i. p. 303. 2d edition.

* The Bishop of Ely has not a palatine jurisdiction within the Isle of Ely; Grant v. Bagge; 2 East, 128. abridged, post, tit. "Process."

† By 37 Geo. 3. c. 85. servants or clerks receiving any monies or other effects on their masters' account, and fraudulently embezzling or secreting any part thereof, shall be deemed to have feloniously stolen the same, and they and their abettors, &c. shall be liable to be transported for fourteen years. But the statute, in mentioning the specific punishment of transportation for fourteen years, does not exclude any other punishment of inferior degree; see 2 East, P. C. c. 16. s. 18.

To constitute embezzlement,† the party must be a servant; receive into his possession; &c. on his master's account; and embezzle. The statute extends to a servant, who receives money marked from a customer to whom his principal had given it for the purpose of trying the servant's fidelity.

But where it was given by the master himself, the

Court ar
rived at a
decree of
acquittal.

appeared that having 2s. 6d. of his master's money, to pay on account of such master, he only paid 1s. 6d., and converted the other 1s. to his own use.—
When upon Park, J. directed the jury to acquit the prisoner.

(b) *Bankers, merchants, brokers, attorneys, or other agents.*

REX v. WALSH. H. T. 1812. C. P. 4 Taunt. 258.

ous to
u. s. *
the embez
zement of
securities
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and other
effects, left
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cial pur
pose in the
hands of a
broker, was
not punisha
ble.

On an indictment for stealing Bank of England notes and other securities, it appeared that the prisoner, a stock-broker, after having advised a proprietor of stock as to the proper time of disposing of it, sold the stock for him, and received the proceeds. The prosecutor instructed him to purchase Exchequer bills to the amount; but the prisoner stating it was too late to do so on that day, lodged the money with his own bankers, and gave the bankers of the prosecutor a check for the amount. On the following day the prosecutor drew a check on his bankers for the same amount, and gave it to the prisoner to purchase Exchequer bills. The prisoner received of the bankers of his prosecutor bank bills for the check, with a part of which he bought Exchequer bills for the prosecutor, and delivered them to the prosecutor's banker; with a part of the residue he paid for American stock and foreign coin, which he had previously purchased, with intention to abscond; and paid away the rest in discharge of other debts of his own, and then absconded. At the trial of the prisoner, his counsel, after first taking an objection that the check in question was not a security, within the 2 Geo. 2. c. 25. contended that, even admitting it to be such a security, yet it was not *stolen* by the prisoner from the prosecutor, as the prosecutor gave it to him, for the purpose of his receiving the money for it at the bankers, and of purchasing Exchequer bills with it to the amount; and that as the money was received for it at the bankers, and Exchequer bills purchased with part of its proceeds, the prisoner could not be charged with having stolen the whole proceeds of the draft. With respect to the charge contained in the first count of the indictment, viz. the stealing of the bank notes, which he considered to be the principal question in the case, he contended that the property of these identical notes never was vested in the prosecutor; that they were received in payment of the check, and that it was not in the contemplation of either of the parties, that they should be brought back by the prisoner to the prosecutor. That, supposing the notes could be said to have been at any time the property of the prosecutor, yet he clearly had parted both with the possession and the property of them to the prisoner; and that in none of the cases where the property as well as the possession had been parted with by the owner, as in *Nicholson's case*, 2 Leach, C. L. 610; S. C. 2 East, P. C. 669. had it been holden, that a misapplication of things so circumstanced amounted to felony. After a *cur. adv. vult.* the prisoner was discharged, this being considered not to amount to felony; for there could be no stealing of the check, as that was delivered to the broker, and applied by him as the drawer of it intended; nor of the bank notes, as they never were in the possession of the prosecutor, and the property of them never was vested in him.

[690]

(B) BY PUBLIC OFFICERS.

(a) *Clerks in the Bank of England.*

Before 15
Geo. 2.† it
was not fel
ony for a
clerk in the
Bank to em
&c., any security or personal effects shall have been deposited, without authority to sell or
bezzle
pledge the same, shall sell, negotiate, pledge, embezzle, &c., the same, in violation of good
bonds deliv
faith, with intent to defraud, such offender shall be deemed guilty of a misdemeanor, and
ered for the
be transported for fourteen years, or receive such other punishment as may be inflicted for a
purpose of
misdemeanor. By s. 2. if any such banker, broker, agent, &c., in whose hands any money
bill, &c., shall be placed with any order in writing, signed by the party to invest such money
&c., shall apply to their own use any such money, &c., in violation of good faith, with in
tent to defraud the owner of such money, &c., such offender shall be guilty of a misdemea
nor, and punished as mentioned in the former section.

1. WAITE'S CASE. Feb. Seesions, 1743. Old Bailey. 1 Leach, C. L. 28.

Upon an indictment for stealing East India bonds, the property of the go-

* Cap. 63. s. 1. which enacts that, if any person with whom, as banker, broker, agent, &c., any security or personal effects shall have been deposited, without authority to sell or pledge the same, shall sell, negotiate, pledge, embezzle, &c., the same, in violation of good faith, with intent to defraud, such offender shall be deemed guilty of a misdemeanor, and be transported for fourteen years, or receive such other punishment as may be inflicted for a misdemeanor. By s. 2. if any such banker, broker, agent, &c., in whose hands any money bill, &c., shall be placed with any order in writing, signed by the party to invest such money &c., shall apply to their own use any such money, &c., in violation of good faith, with intent to defraud the owner of such money, &c., such offender shall be guilty of a misdemeanor, and punished as mentioned in the former section.

But, by s. 5. no person is to be convicted, if he shall, previously to being indicted, have disclosed the matter by compulsory process, in any action, &c. in which he shall have been a party, and which shall have been bona fide instituted by the party aggrieved.

† Cap. 13. s. 12. any officer of the Bank of England, being entrusted with, or having any

vernor of the Bank of England, it appeared that the bonds in question having been taken to the Bank, for the purpose of being deposited there, were not carried to the usual place for such deposits, viz. a chest in the cellar of the Bank, but were received by the prisoner, who was a cashier there, and placed by him in his own desk. The judges ruled, that the prisoner was not guilty of felony, in afterwards selling the bonds and converting the money to his own use, on the ground that, as the bonds were never put into the cellar in the usual course, the Bank had no possession of them, but the possession remained always in the prisoner.

2. **ASLETT'S CASE.** Sept. Sess. 1803. Old Bailey. 2 Leach, C. L. 953. [691]

It was contended in this case, that admitting the offence charged to be of such a description as would be within the 15 Geo. 2. c. 13. s. 2., yet that the prisoner could not be convicted under it, because that statute applied to the punishment inflicted by it has been repealed by the 37 Geo. 3. c. 5. But all the judges were clearly of opinion that nothing is contained in the 37 Geo. 3. which could operate as a repeal of any part of the 15 Geo. 2. [691]
It was at one time thought that the 15 Geo. 2. was repealed by the 37 Geo. 3. c. 85.

3. **REX v. BAKWELL.** April Sess. 1802. Old Bailey. 2 Leach, C. L. 943.

Upon an indictment on the 15 Geo. 2. it was proved that the prisoner who had been employed in taking an account of certain paid notes, had embezzled a paid note not properly cancelled, and uttered it as his own property. On the question whether this case was within the meaning of the word *effects* used in the statute? The judges said that they had no doubt but that a paid note was certainly part of the *effects* belonging to the Bank. The jury found the prisoner guilty. The point, however, was reserved for the consideration of the twelve judges, but no opinion was ever given. The word "effects" on the 15 Geo. 2. applies to paid notes.

4. **REX v. ASLETT.** July Sess. 1803. Old Bailey. 2 Leach, C. L. 954.

This was an indictment on the 15 Geo. 2. for feloniously secreting and embezzling "certain bills, commonly called Exchequer bills." It appeared that the bills in question were issued under the 13 Geo. 3. c. 5. which contained a proviso that every such bill should be signed by the auditor of the Exchequer, or by some person duly authorised; that the bills in question had not been signed by a person duly authorised, the authority of the signer not having been renewed. Whereupon it was contended, that the bills in question were not legal Exchequer bills, and that as the indictment averred the instruments to be "Exchequer bills," the prisoner must be acquitted, and of that opinion were the Court, who said the Bank having purchased them as good Exchequer bills, could not dispense with the formalities required by the statute. But the 15 Geo. 2. does not extend to an indictment charging the embezzlement of "Exchequer bills;" if they turn out to be not Exchequer bills, in as much as they were not duly signed; though such instruments come within the words "securities" or "effects."

5. **REX v. ASLETT.** Sept. Sess. 1803. Old Bailey. 2 Leach, C. L. 958.

An indictment was preferred, describing the Exchequer bills, 1st, as *effects* being paper writings, purporting to be Exchequer bills; 2nd, stating them to be certain papers upon the credit whereof the bank had advanced a large sum of money; and lastly, calling the bills in question *securities*, instead of the word *effects*. It was contended, 1st, that the prisoner having been acquitted on the former indictment, he could not be again charged with having embezzled the same papers; 2nd, that the 13 Geo. 3. having declared these bills void, unless duly signed, were mere waste paper, and of no value at the time of the embezzlement, and could not *ex post facto* make them valuable effects within the 15 Geo. 2. and it was impossible to say that the word *effects* could apply to those things not intrinsically valuable; but,

Le Blanc, J., said, the word *securities* was used in the statute, as well as the word *effects*, which showed that the legislature intended that the statute should extend to other kinds of property than securities; the word *effects* being a larger and more comprehensive meaning than the word *securities*; and also that the offence of embezzling the effects or securities mentioned in the act was not made to pay, where some value must attach on the thing taken, but was created a felony, which induced no necessity for any value being ascertained.—

but if a person, or other offender, shall take the same, he is made guilty of felony, without benefit of clergy; and this statute has been confirmed by 15 Geo. 3. c. 6. s. 6, and 37 Geo. 3. c. 46.

The jury found the prisoner guilty. On a case reserved, the judges concurred with *Le Blanc, J.*

(b) *Collectors of rates and taxes.** (c) *Surveyor of highways.†*

II. RELATIVE TO OTHER PERSONAL PROPERTY.

(A) *PROPERTY IN A WORKHOUSE.‡*

(B) *PROPERTY IN GREENWICH HOSPITAL.§*

(C) *MANUFACTURES. See post, tit. Larceny.*

[693] (D) *LETTERS, &c. BY POST-OFFICE OFFICERS. See post, tit. Post-office.*

(E) *MILITARY AND NAVAL STORES. See post, tit. Public Stores.*

III. RELATIVE TO THE INDICTMENT.

1. *HOBSON'S CASE. Lent Assizes, 1813. Shrewbury, 1 East, P. C.*

Addend xxiv.

The venue may be laid in the county in which it appears that the prisoner received the money with intent to embezzle;

The prisoner was indicted at A., in the county of B. It appeared at the trial that the master resided at C., in the county of D.; that he had authorized the prisoner to receive certain sums of money at A., which the prisoner, though it was proved he had received them at A denied that he ever had. The question was, whether the indictment might not be found and tried in the county where the goods or money were received. The judges were of opinion that the trial was properly had at A.

2. *REX V. TAYLOR O. t. Sess. 1803. Old Bailey, 2 Leach, C. L. 974; S. C. 3 B. & P. 596.*

Or, if the servant receive the money in one county, and the master lives in another, the venue may be laid in the latter.

The prosecutor, a fishmonger, lived in the county of Middlesex: the prisoner, his servant, received money in the county of Surrey, which he embezzled. The venue was laid in Middlesex. It was contended that the offence was committed in Surrey and not in Middlesex, which consisted in the receipt of the money. On a case reserved, the judges considered that the offence was triable in either county, as referable to the original taking in one, and the not accounting or denying the receipt in the other.

3. *REX V. JOHNSON. II. T. 1815. K. B. 3 M. & S. 539.*

The indictment for embezzlement may contain a count for larceny at common law;

This indictment contained several counts, some of which charged the prisoner with embezzling bank notes against the form of the statute, and others with stealing bank notes in the common form of counts for larceny. It was contended to be a misjoinder, on the ground that a different judgment must be given on the counts for embezzlement on the statute, and the counts for grand larceny. But the court were of opinion that the counts for embezzlement might well be joined with the counts for larceny, because the statute had in fact made the offence of embezzlement described in it a larceny, and that having done so, it had annexed to it all the properties and consequences attaching upon the crime of larceny.

* By 50 Geo. 3. c. 59. s. 1. any person embezzling or fraudulently applying money issued to them for the public services, to be adjudged guilty of a misdemeanor, and punished by transportation.

And, by s. 2. any such officer, collector, &c. entrusted with the receipt or management of the public revenues, and furnishing false statements, to be adjudged guilty of a misdemeanor, and punished by fine and imprisonment. &c.

† It seems that embezzlement by a surveyor of the highways of materials procured for repairing them at the expense of the parish, is indictable as a misdemeanor at common law; see *Russ. C. & M. 1251.*

‡ By 55 Geo. 3. c. 137. as to embezzlement by poor persons in workhouses, it is enacted that, if any person shall knowingly take it in pawn or receive any goods, &c., provided for the use of the poor in a workhouse, or given to the poor by the overseers, &c., or any goods, &c., or materials, belonging to a workhouse, or shall receive, or buy, any of the provisions provided for the poor of such workhouse, he shall forfeit for every offence not exceeding five pounds, not less than one, upon conviction before J. P. And it is further declared that if any pauper shall run away from the workhouse with the parish clothes, he shall be sent to goal for three calendar months.

§ By 54 Geo. 3. c. 110. if any pensioner, or nurse, shall desert or run away, and carry with them any clothes, &c., belonging to the hospital, they shall, upon conviction, be committed to the goal of the town, &c. where they shall be apprehended, for six calendar months.

4. *REX v. M'GREGOR.* Sept. Sess. 1801. Old Bailey, 2 Leach, C. L. 932; S. C. 3 B. & P. 106.

An indictment on the 39 Geo. 3. for embezzlement did not expressly aver that the money alleged to have been feloniously taken and carried away by the prisoner was the money of any particular person. It was objected that, as the statute has not made the sort of embezzlement therein mentioned *eo nomine* a distinct and substantial felony, but has only enacted that the property received into the possession of the servant, and feloniously converted by him, shall be considered as having been by such conversion feloniously taken from the possession of the master, the offence still continues at common law larceny, and that, consequently, an indictment framed upon that statute must contain all the requisites of an indictment for larceny at common law.

For the crown it was argued, that the statute in question made the embezzling by servants in the manner stated a substantive felony, which before was only a misdemeanor or breach of trust, for which the master had a civil remedy; that it was therefore sufficient to follow the words of the act, as in other cases where new offences were created. But a majority of the judges were of opinion that the indictment was defective, as it did not aver that the money alleged to have been stolen was the money of the prosecutor; that the statute made the offence a larceny, and made the possession of the servant under such circumstances the possession of the master.

5. *REX v. WHITTINGHAM.* Feb. Sess. 1801. Old Bailey, 2 Leach, C. L. 912.

An indictment on 39 Geo. 3. stated, that the prisoner being such servant, did receive and take into his possession the sum of seven shillings from one A., for and on account of his master, and did afterwards feloniously embezzle, &c. the said sum of seven shillings. The evidence proved that only one shilling and three pence had been received and not accounted for by him.

The Court ruled that the evidence did not support the charge, and directed an acquittal.

6. *REX v. JOHNSON.* H. T. 1815. K. B. 3 M. & S. 539.

An indictment upon the 39 Geo. 3. c. 85. charged the prisoner with receiving into his possession "divers, to wit, nine bank notes, for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money, and of the value of 9*l.* of like lawful money," for and on account of his employers. It was objected that there was a want of certainty in the description of the thing charged to be embezzled; for all the indictment alleges is, that the prisoner received divers bank notes, laying the number and amount for which, payable under a videlicet, so that neither need be previously proved; for although the defendant be proved to have received but one, he might be convicted under this form of indictment.

Sed per Cur. It has been argued as if the prosecutor was bound to prove the exact amount of the value and number laid; whereas, if he proved only one bank note of the value of 1*l.*, it would be sufficient to support the charge. If the indictment had charged the things to have been nine printed books, of the value of 9*l.*, instead of nine bank notes, and one book had been proved to have been stolen, it would have been enough; so here it is laid that the amount is nine, and the value 9*l.*, and why is not this the same?

7. *REX v. GILBERT.* May, 1810. Old Bailey, cited Ross on C. & M. 1237. note (o).

This indictment for embezzlement was holden bad, because it did not aver that the prisoner was entrusted to receive money, and the prisoner was in consequence discharged.

8. *REX v. CRIGHTON.* Summer Assizes, 1803. Lancaster, cited *REX v. JOHNSON.* 3 M. & S. 555.

The indictment charged that the prisoner was employed as a clerk to A., and that by virtue of his employment he received from B. on account of his master, 9*l.* 18*s.* 9*d.* and that he fraudulently embezzled and secreted the same, omitting the word "feloniously" at the commencement, concluding, "that he did feloniously embezzle, &c." It was objected, that it did not appear from the in-

And must possess all [594] the requisites of an indictment for larceny at common law.

It has been said the amount embezzled ought to be stated accurately;

But where the indictment was for embezzling "divers, to wit, nine bank notes for the payment of divers sums of money, amounting in the whole, to a certain sum of money, to wit, the sum of 9*l.*" it was holden sufficient.

So, it must aver that the prisoner was "entrusted to receive, &c." And that he feloniously embezzled; though the

word "feloniously" shown in the body of the indictment, and it is not enough to allege it at the conclusion. But the judges overruled the objection.

IV. RELATIVE TO THE EVIDENCE.

HEFF'S CASE. Summer Assizes, 1818. Stafford, cited Russ. C. & M. 1242. The indictment contained a variety of counts, some for embezzlement under the statute, others for larceny at common law. The evidence being very general, Garrow, B. said, that the evidence stated would only go to show a conversion by the prisoner of the monies of the prosecutor, consisting probably of numerous distinct acts of embezzlement, all of which were distinct felonies; and, if ascertained, might be made the subject of distinct prosecutions; but that it was necessary they should be so ascertained and distinguished, and that the prosecutor should select some one act of embezzlement, in support of the present indictment, the rule of law being that, where a transaction proposed to be given in evidence appears clearly to consist of several distinct felonies, the prosecutor ought to be put to select some particular case on which he will proceed.

V. RELATIVE TO THE PUNISHMENT. *Vide ante.*

[696] **Emblements.** See tits. *Executor and Administrator; Heir; Landlord and Tenant.*

Embracery.*

Enemy See tit. *Alien—Enemy.*

Entravelsment. See tit. *Copyhold.*

England, Bank of. See tits. *Bank of England; Embezzlement.*

Engraving. See tit. *Prints or Engravings.*

Engrossing. See tit. *Forestalling.*

Enlistment. See tits. *Apprentice; Army; Habeas Corpus; Soldiers.*

Entrite. See tit. *Estate.*

Entries. See tit. *Tradesmen's Books.*

Entry. See tits. *Ejectment; Estate; Infant; Landlord and Tenant; Limitation, Statute of; Process.*

Entry, Forcible. See tit. *Forcible Entry.*

Entry, Writ of.

HULL V. BLAKE. T. T. 1812. C. P. 4 Taunt. 572.

The disseisor's name in a writ of entry,† can not be amended. Motion to amend a writ of entry *sur disseisin en le post*. It appeared that the disseisor had been described as the elder instead of the younger, and that the tenant had pleaded that A. B., the elder, had not disseised. The Court refused the application to amend.

* An attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment; and for the jury so embraced, if it be by taking money, the punishment is perpetual infamy, imprisonment for a year, and forfeiture of tenfold value; see 4 Bl. Comm. 140; 1 Hawk. P. C. 85.

† The writ of entry is a possessory remedy which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continued possession. The writ is directed to the sheriff, wherein it appears that the tenant is required either to deliver seisin of the lands, or to show cause why he will not. The writs of entry are of four different kinds. The first is a writ of *entry sur disseisin* that lies for the disseisee against a disseisor upon a disseisin done by himself. Second. A writ of entry *sur disseisin in le per* against the heir by descent, who is said to be in the *per* as he comes in by his ancestor; and so it is if a disseisor make a feoffment in fee, gift in tail, &c.; the feoffee and donee are in the *per* by the disseisor. Third. A writ of entry *sur disseisin in le per et cui*, where the feoffee of a disseisor makes a feoffment over to another when the disseisee shall have his writ of *entry sur disseisin*, &c. of the lands in which such other had no right of entry but by the feoffee of the disseisor, to whom the disseisor demised the same, who unjustly, and without judgment, disseised the demandant; see 1 Inst. 238. And lastly, a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrong-doer, without deducing all the intermediate titles from him to the tenant, stating it in this manner, that the tenant had not entry, unless after, or subsequent

Equity. See tit. *Chancery*.1. *PYNE v. DOR.* M. T. 1785. K. B. 1 T. R. 56.

Per Lord Mansfield, C. J. I agree with the counsel at the bar that when a general rule of property is established by a court of equity, it should be followed by a court of law, that their decisions should be uniform.

2. *CALDWELL v. BALL.* E. T. 1786. K. B. 1 T. R. 214. S. P. HOLLESTON v. HIBBERT. M. T. 1789. K. B. 3 T. R. 404.

Per Ashhurst, J. When equity is equal between the contesting parties, a legal title must prevail.

qual, a legal title must prevail.

3. *FOONE v. BLOUNT.* T. T. 1776. K. B. Cowp. 467.

Per Cur. The doctrine and principles of the courts of equity consider that which is to be done the same as if it were done.

4. *THE MANCHESTER MILLS' CASE*, cited in *CORT v. BIRKBECK.* T. T. 1779. K. B. 1 Doug. 222.

This was an application to revive a decree of 5 Jac. 1. against the defendants. The decree had established a custom that all the inhabitants of Manchester should send their corn which was to be spent in their houses to be ground at the plaintiff's mills; the defendants had bought bread and flour, which the bakers had brought from some place in the neighbourhood, and which had not been ground at the plaintiff's mills. The Court resolved, first, that the decree establishing the custom, and which had been confirmed by others, both of a prior and subsequent date, ought not to be controverted, nor the existence of the custom litigated any further before a jury; 2nd, that such a decree binds all persons under the same description with the original defendants; 3d, that it is only in the case of a direct breach that such a decree can be revived by *scire facias*, and if it is evaded, the method of proceeding is by a supplemental bill.

vived by *scire facias*; but where it is only evaded, the proceedings must be by supplemental bill.

5. *MORGAN v. HORSEMAN.* M. T. 1810. C. P. 3 Taunt. 241.

Per Lord Mansfield, C. J. It is impossible for this Court to look at any thing but the case referred to by the Court of Chancery, and it has no authority to give any opinion on any thing but the question put by the Lord Chancellor.

Equity of Redemption. See tit. *Mortgage*.**Erasure.** See tits. *Bills and Notes; Bond; Contract; Deeds.*

to, the ouster, or injury done by the original dispossessor, and rightly concluding, that, if the original title was wrongful, all claims derived from thence must participate of the same wrong.

* In an action of trespass directed by the Lord Chancellor to try a question of bankruptcy, the Court of Common Pleas will not restrain the defendant from pleading the general issue, together with special justification; *M'Connell v. Hector*, 2 B. & P. 549; abridged vol. iii. p. 547.

[697]

General rule of property in equity should be recognised by a court of law.

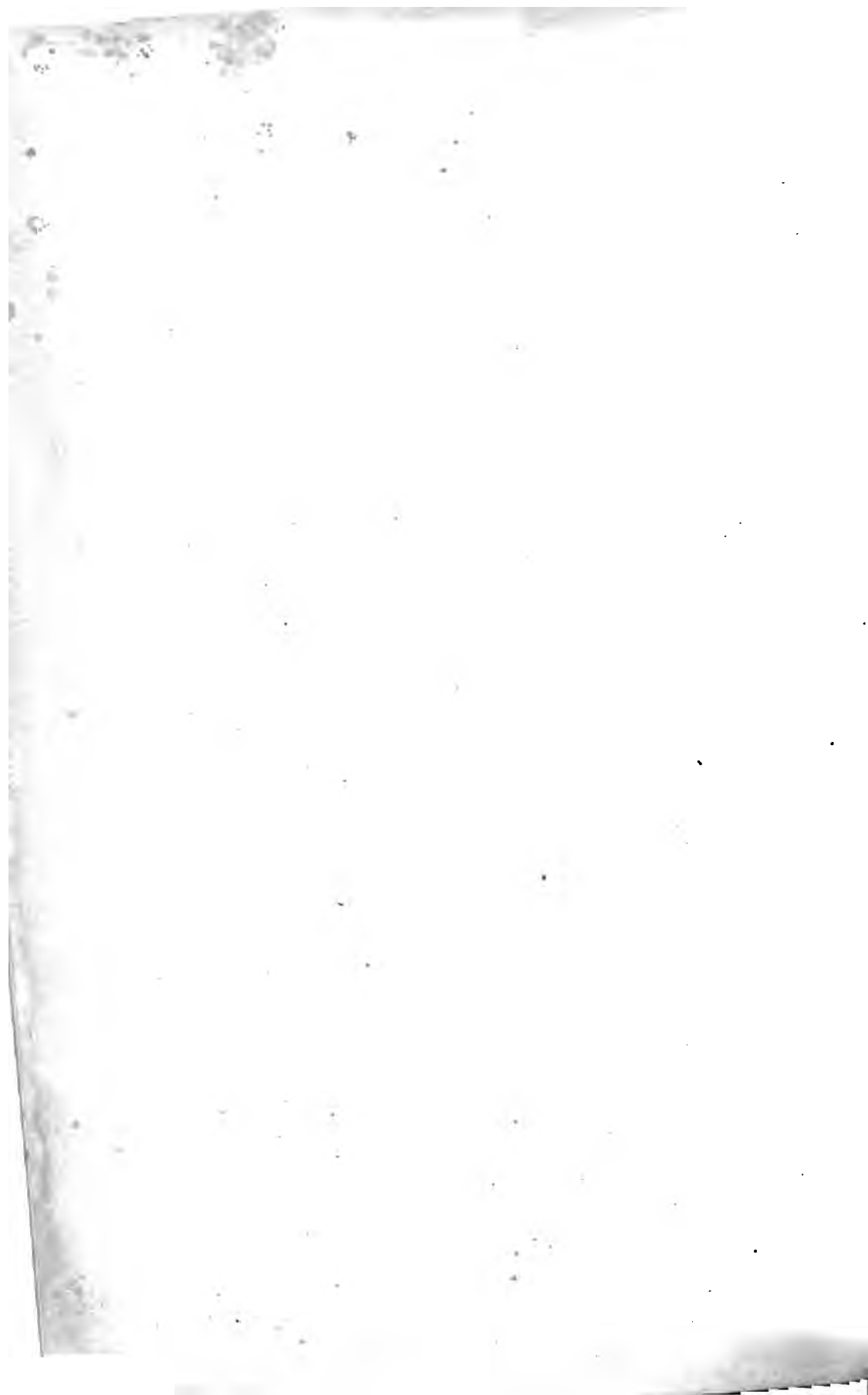
Where the equity is a

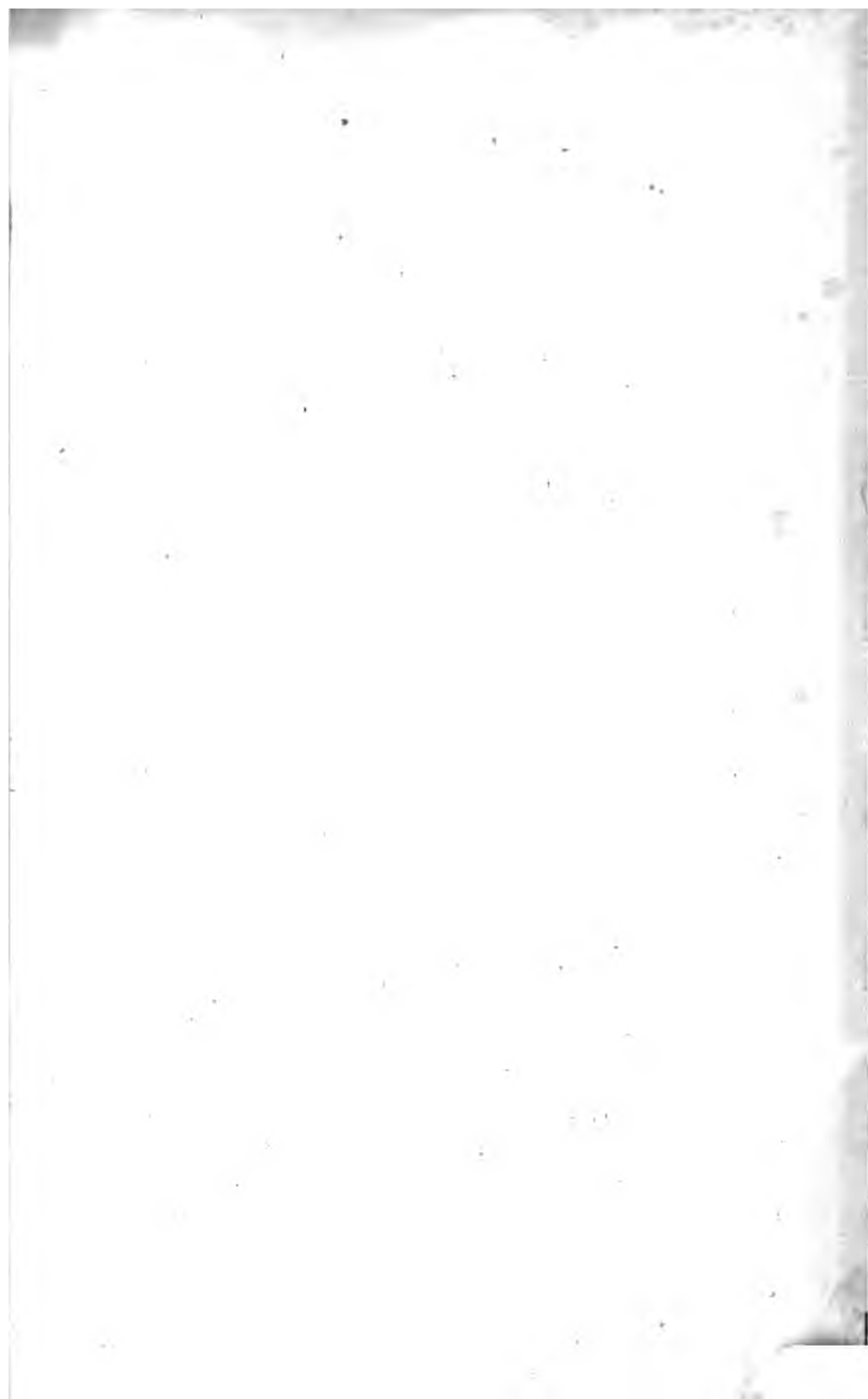
Equity deems what is to be done, as if it were done.

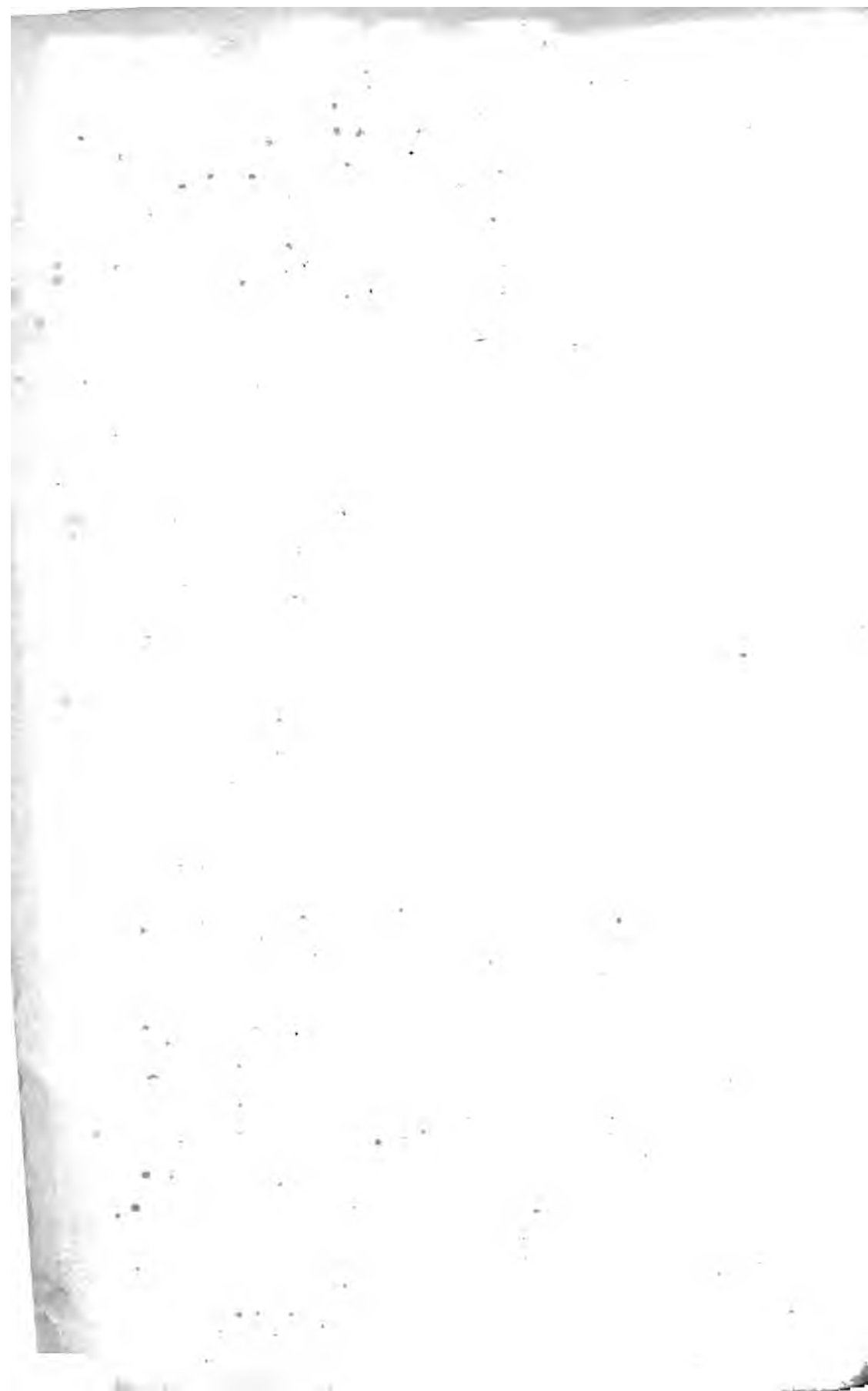
A decree to establish a custom binds all persons; and in the case of a direct breach of the custom, established by such decree, it may be re-

[698]

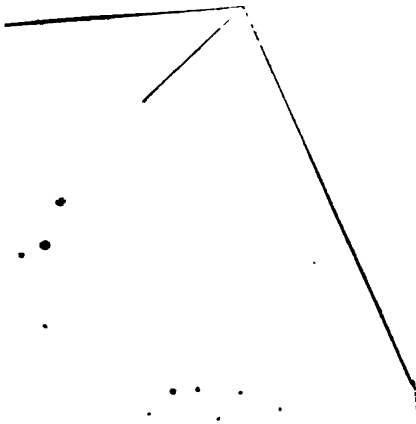
such decree, it may be re-
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